No. 7-17

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

FRANK COSTELLO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

(Vol. I—Pages 1a - 408a, Incl.)

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United States Court of Appeals

For the Second Circuit

C-141-3

THE UNITED STATES,

vs.

FRANK COSTELLO.

Docket Entries

Date	Proceedings
3-11-53	Filed Indictment.
3-11-53	Bench warrant ordered. Bench Warrant Issued. Noonan, J.
3-12-53	Filed notice of appearance by Joseph Leary Delaney, Atty 350-5th Av. NYC.
4-13-53	Filed stipulation—deft. withdraws application for writ of habeas corpus ad pros. without prejudice. So ordered. Noonan, J.
4-15-53	Filed affdt for writ of habeas corpus ad pros. Issued writ. Ret. 4-23-53.
4-23-53	Deft. produced on writ. Deft. arraigned on warrant. Pleads not guilty. Bail $5000. 20 days for motions. Clancy, J.
3-13-53	Filed affdt and order to show cause—for issuance of writ of habeas corpus ad pros. Noonan, J. Memo endorsed—This motion has been withdrawn by stipulation heretofore argued. 4-24-53. Noonan, J.
4-24-53	Filed affdt in opposition to motion filed 3-13-53.

Docket Entries

Date	Proceedings
4-30-53	Government's oral motion to discharge writ of habeas corpus granted. Clancy, J.
4-30-53	Filed affdt by J. L. Delaney in opposition to motion to discharge writ of habeas corpus.
5-11-53	Filed bench warrant and entered marshal's return.—Deft. produced on writ of habeas corpus ad pros. 4-15-53.
5-13-53	Filed affdt and notice of motion for bill of particulars. Memo endorsed 6-10-53—Motion granted as to items designated in notice of motion as (a)(b)(c); denied as to items (d)(e). Ryan, J.
6-10-53	Filed affdt in opposition.
6-16-53	Filed copy of writ of habeas corpus and marshal's return, "Writ Satisfied 4-30-53. Clancy, J.
6-19-53	Filed notice of settlement and order granting motion for bill of particulars. Ryan, J.
6-29-53	Filed bill of particulars.
9- 9-53	Filed Transcript of record of proceedings, dated 4-23-53.
9-23-53	Filed bond dated 4-23-53 for $5000. Mfgrs. Casualty Ins. Co. surety.
11- 2-53	Filed Order to show cause for permission to leave the limits of the S. D. N. Y. Conger, J. Memo endorsed "Motion denied except to extent consented to by the Government, i. e., that bail limits are extended to include defendants wife house at Sands Point, Long Island on proper consent of surety." 11-4-53. Dimock, J. Filed affidavit of Deft Frank Costello for permission to leave the jurisdiction of this court, and consent of surety.

Docket Entries

Date	Proceedings
11- 6-53	Filed Order and consent of surety, that deft F. Costello be and hereby is permitted to leave the jurisdiction of this Court and go to the Eastrict of New York and that motion is denied in all other respect, without prejudice to renew application upon a proper showing. Dimock, J.
11-24-53	Filed motion for further bill of particulars Ret. 11-30-53. Memo Endorsed—11-30-53. Motion Denied. Dimock, J.
12- 1-53	Filed affidavit of Lloyd P. MacMahon, Asst U. S. Atty in opposition of motion filed 11-24-53.
12- 4-53	Filed Transcript of record of proceedings, dated 11-4-53.
1-27-54	Filed Order to show cause for an order under Rule 17(c) of Fed. Rules of Criminal Procedure directing that the books, papers etc. designated in subpoenas duces tecum served upon witness Michael J. Tanico, Phil Kastel and Charles B. Murphy be produced before the Court at a time prior to trial to wit on 2-11-54 and said books, papers, etc. may be inspected by parties hereto and their attys, etc. I. R. Kaufman, J.
2- 2-54	Filed Order to Show Cause why trial should not be adjourned from March 1 to July 1, 1954—Ret. 2-4-54—Memo Endorsed 2-4-54. "Trial adjd to April 5, 1954. Defense counsel instructed that he must be ready to go to trial on that Day". McGohey, J.
2- 4-54	Filed Affidavit of Lloyd F. MacMahon Chief Asst U. S. Atty in opposition to motion for further postponement of trial.

Docket Entries

Date	Proceedings
2- 5-54	Memo endorsed on order to show cause filed 1-27-54 "Motion Granted. Order Settled and signed today 2-5-54. McGohey, J.
2- 5-54	Filed order that Michael J. Tanico, Phil Kastel and Charles B. Murphy shall produce books and records specified in subpoenas duces tecum etc. and that the cost of transporting aforesaid books and records to NY from New Orleans shall be borne by the United States not to exceed $600. etc. and the cost of returning said books, etc. shall be borne by the U. S. not to exceed $600. McGohey, J.
2- 8-54	Filed Notice of Motion for discovery and inspection etc.—Ret. 2-1-54. See memo End. 2-6-54—McGohey, J.
2-19-54	Filed Order to show cause Ret. 2-23-54, directing that the Minutes of the Grand Jury returning the indictment herein be examined and the indictment dismissed etc. Edward Weinfeld, D. J.
2-20-54	Filed letter to McGohey, J. from Hilary J. Gaudin, Esq. dated 2-16-54 with the statement "This letter and the attached schedule were received at my chambers Sat., 2-20-54—McGohey, J."
2-19-54	Filed Transcript of record of proceedings, dated 12-7-53 and 2-4-54.
2-26-54	Filed Opinion #20961—Motion to inspect Grand Jury Minutes denied. Weinfeld, J.
4- 1-54	Filed order to show cause why an order should not be made herein directing the issuance of a commission to examine under oath Frank Erickson at Milan, Michigan. Dimock, J.

Docket Entries

Date	Proceedings
4- 2-54	Memo endorsed on motion papers filed 4-1-54—Motion granted on condition deft. serve interrogatories by 4-6-54. Govt to be served cross-interrogatories expeditiously. Defendant will not use granting of this motion at the opening of the trial as basis of adjournment of trial on Apr 5 or whenever it opens.—So ordered. Goddard, J.
4- 2-54	Filed affidavits of prejudice.
4- 5-54	Filed interrogatories to be propounded by Frank Erickson.
4- 7-54	Filed Order that motion to take deposition of Frank Erickson as a witness be granted, that deft serve the proposed interrogatories by April 6, 1954, the Clerk to forward necessary papers to take this deposition, said deposition to be returned to the Clerk and motion is granted that deft does not use granting hereof as a ground for adjournment etc. Goddard, J.
4- 7-54	Filed Transcript of record of proceedings, dated 3-19-53.
4- 9-54	Issued commiss on to Milan, Mich. (Erickson).
4-22-54	Filed interrogatories — Deposition of Frank Erickson.
4-27-54	Filed affdt and order authorizing the U. S. Atty to employ Dr. Howard G. Bruenn to examine Joseph Henschel and submit a medical report. U. S. Atty authorized to pay fee. McGohey, J.
4-29-54	Filed order granting motion to vacate order of Hon. H. W. Goddard dated 4-7-54 to take testimony of Frank Erickson. Goddard, J.

Docket Entries

Date	Proceedings
4- 5-54	—Before McGohey, J. Trial begun. Defendant makes application for a bill of particulars and further time. Motions denied.
4- 6-54	—Trial cont'd. Deft. moves for the withdrawal of a juror and for a mistrial. Motions denied. Trial continued on April 7, 8, 9, 12, 13, 14, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, May 3, 4, 5, 6, 7.
5-10-54	—Trial Continued—Deft moves to dismiss the indictment and for a judgment of acquittal—Motion Denied.
5-11-54	—Trial Continued. Deft Rests—Govt Rests—Deft renews motions made at close of Govt's Case—Motion Denied.
5-12-54	—Trial Continued. Summations by counsel.
5-13-54	—Trial Continued. Charge by the Court 11:22 A. D.—Officer Sworn—Jury Retires 11:25 AM—Verdict 9:40 PM—Not Guilty on count one. Guilty on counts 2-3-4—Jury Polled—Sentence 5-19-54 at 11 AM. Bail increased to $25,000. and to be posed at 11 AM on 5-14-54.
5-17-54	—Defendant moves to set aside verdict, for a new trial and for arrest of judgment. Motions denied. McGohey, J.
5-17-54	—Filed Judgment #59217—Five Years on counts 2, 3 and 4 to run concurrently at a place of confinement to be designated by the Atty Genl. Fined $10,000. on counts 2, 3 and 4 and to stand committed until fines are paid on counts 2, 3 & 4 or he is otherwise discharged according to law. Deft. remanded. Bail discharged. Defendant to pay the cost of prosecution as taxed. McGohey, J.

Docket Entries

Date	Proceedings

5-17-54—Issued commitment and copies.

5-17-54—Filed Notice of Appeal.

5-18-54—Filed Court's exhibits #1, 4id, 6id and 7id. Court's exhibit #1 placed in vault for safe keeping pending appeal.

5-20-54—Filed affdt and order for writ of habeas corpus ad test. for examination in sup pro. Issued writ. Ret. 5-27-54.

5-21-54—Filed commitment and marshal's return deft delivered to Det Htrs., NYC on 5-17-54 for service of sentence or for transfer to another institution designated by the Atty General.

5-21-54—Filed copy of order for writ of habeas corpus ad test. filed 5-20-54 & Marshal's return "Served on Det at Det Htrs., NYC on 5-20-54.

5-25-54—Filed Transcript of record of proceedings, dated Apr. 6, 7, 8, 9, 12, 13, 14, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, May 3, 4, 5, 6, 7, 10, 11, 12, 17.

5-27-54—Frank Costello sworn in supplementary proceeding. Sugarman, J.

6-16-54—Frank Costello sworn in supplementary proceeding. Conger, J. Hearing begun before Judge Conger and adjd to 6-29-54.

6-19-54—Filed Bond of Deft Costello on appeal, dated 6-19-54 $50,000. Manuf. Cas. Ins. Co., surety.

6-21-54—Filed Certified of order and memorandum, fixing bail of deft in the sum of $50,000. pending appeal. Robert H. Jackson, Judge, Supreme Court of the U. S.

6-23-54—Filed notice of motion for order to tax costs "Entry corrected (Filed Bill of Costs taxed at $4,111.38, Clerk).

Docket Entries

Date Proceedings

6-25-54—Filed Motion for enlargement of bail limits. Memo Endorsed. "Motion Granted, no objection by the Govt". Conger, J. and
Filed Order allowing defendant to leave the jurisdiction of this court and consents—Conger, J.

6-25-54—Filed true copy of order of C. C. A. releasing deft in bail of $50,000. "Memo Endorsed 6-19-54—Deft released in bail of $50,000. as per order of Justice Jackson herein". McGohey, J.
Filed stipulation designating Record on Appeal.
Filed stipulation extending time to docket the appeal and file record on appeal to and including July 15, 1954—So Ordered 6-25-54. Conger, J.

6-30-54—Filed Notice of motion and affidavit for an order taxing costs of prosecution in the amount of $6535.66.

6-28-54—Filed Transcript of Record of proceedings, dated May 27, 1954, June 7, 8, 1954, June 16, 1954.

7- 8-54—Memo endorsed on motion filed 6-30-54. "Referred to Judge McGohey, Wright, J.

7- 9-54—Filed copy of writ of habeas corpus ad testificandum—Memo Endorsed 6-16-54. Writ Satisfied. Conger, J.

7-14-54—Filed Order that the Clerk is directed to transmit to the U. S. Court of Appeals the file in this case and further ordered that the file be safely kept by the Clerk of the U. S. Court of Appeals and returned to this Court upon the conclusion of this appeal. Wright, J.

7-15-54—Filed Certified Record on Appeal to U. S. C. A.

7-27-54—Docketed as Judgment #59424 (Bill of Costs).

8- 9-54—Filed Order to Show Cause dated 6-24-54 that deft F. Costello appear before this court on

Docket Entries

Date	Proceedings
	6-29-54 to show cause why he should not be adjudged in contempt of this Court by reason of his failure and refusal to make discovery on oath as to his income etc. Conger, J.
8- 9-54	—Filed Order that the order to show cause to hold deft Costello in contempt of this court be and the same is withdrawn and that the order dated 5-20-54 by Hon. J. W. Goddard requiring the defendant to appear and make discovery on oath concerning his property be and the same is vacated. Conger, J.
8- 9-54	—Filed Transcript of record of proceedings, dated 6-29-54.
8-10-54	—Filed Notice of motion for an order permitting deft to leave the jurisdiction of this court. Ret. 8-16-54, 8-17-54. Motion Argued. Decision Reserved. Palmieri, J. 8-18-54. Memo Endorsed. "Motion Denied." Palmieri, D. J.
8-18-54.	Filed affidavit of Powell Pierpoint Asst U. S. Atty in opposition to motion for enlargment of bail limits.
6-30-55	—Filed affdt. consent and order permitting deft. to leave jurisdiction of this court. Walsh, J.
10-26-55	—Filed affdt. and notice of motion for an order enlarging bail limits. 10-31-55—Motion argued. Decision reserved. Sugarman, J.
12- 8-55	—Memo endorsed on motion papers filed 10-26-55—In the light of movant's refusal to present himself at the office of Dr. William B. Allen for examination, the motion is denied and it is so ordered. Sugarman, J.
12- 8-55	—Filed affdt of Witney North Seymour Jr. Asst U. S. Atty in opposition to motion enlarging bail.

Docket Entries

Date	Proceedings
12- 8-55	Filed affdt. of Dr. William B. Allan.
12- 8-55	Filed affdt. of Gerald F. O'Brien.
4-25-56	Filed true copy of Opinion and judgment of U. S. Supreme Court. The U. S. C. A. affirming cts 3 & 4 & reversing ct 2. Judgment of U. S. C. A. affirmed.
5- 1-56	Filed notice of settlement and order on judgment. Judgment of U. S. Supreme Court made judgment of this court and deft. to surrender 5-7-56. Ryan, J.
5- 1-56	Filed unsigned order on judgment.
5- 2-56	Filed affdts. and Order to Show Cause why sentence should not be suspended. Ret 5-7-56. Ryan, J. 5-7-56—Motion argued—Decision reserved. McGohey, J. 5-7-56—Memo endorsed. The motion is denied. So ordered. McGohey, J.
5- 7-56	Filed affdt. of Harold M. Janney and Whitney N. Seymour Jr. in opposition.
5-15-56	Filed affdt. and notice of motion for an order vacating and setting aside sentence pursuant to Title 28, Sec. 2255 U. S. C.
5-28-56	Filed Transcript of record of proceedings, dated 5-7-56, 5-21-56.
6-25-56	Filed a true copy of order on Judgment—Judgment of Supreme Court of the U. S. made Judgment of District Court and deft. to surrender 5-7-56. Ryan, J. & entered marshal's return. Deft. committed to Fed Det Hdqtrs NYC 5-7-56.
8-21-56	Filed affdt in opposition to defts. motion to vacate sentence.

Docket Entries

Date	Proceedings
8-21-56	Filed Opinion #22885 by McGohey, J.—Motion to vacate sentence denied. Settle order. McGohey, J.
8-30-56	Filed notice of appeal to U. S. Circuit Court from the decision rendered by this Court on 8-21-56.
9-17-56	Filed undertaking for costs pending appeal in the sum of $250. dated 9-14-56. U. S. Fidelity and Guaranty Co. (Surety).
10- 3-56	Filed stipulation listing papers to be included in the record on appeal.
10- 4-56	Filed notice that the record on appeal has been certified to the U. S. Circuit of Appeals 10-4-56.
11-28-56	Filed affidavit and notice of motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure for an order granting a new trial on the grounds of newly discovered evidence. 12-17-56—Respectfully referred to Judge McGohey. Ryan, J.
12-27-56	Filed Transcript of record of proceedings, dated 12-17-56.
12-31-56	Filed opinion and true copy of order from U. S. C. A. affirming the order of the U. S. District Court.
2-15-57	Filed stipulation, agreeing that the hearing of defendant's motion for a new trial, heretofore scheduled for 2-26-57, is adjourned until after the determination of the appeal presently pending on certiorari in the U. S. Supreme Court.
3-11-57	Filed a true copy of order received from the Supreme Court of the United States admitting Frank Costello to bail, pending the disposition of the Achilli case, by executing a good and suf-

Docket Entries

Date Proceedings

ficient bail bond in the sum of $25,000 the same to be approved by a district judge of the Court in which petitioner was convicted. Following approval the bond will be posted with the clerk of the District Court.

3-11-57—Filed Bond dated 3-11-57 in the sum of $25,000 pending hearing on motion before U. S. Supreme Court. Public Service Mutual Insurance Co. (Surety).

3-14-57—Filed true copy of order received from the Supreme Court of the United States admitting Frank Costello to bail. Released on bail as of 3-11-57. Murphy, J.

3-22-57—Filed Transcript of record of proceedings, dated 2-13-57.

4-11-57—Filed affidavits and order extending the Bail Limits of Frank Costello. Consented to by U. S. Atty. and Surety. Dated 4-11-57. Levet, J.

6-28-57—Filed Transcript of record of proceedings, dated 6-13, 14, 19-57.

7- 1-57—Filed a true copy of the Judgment from the U. S. Supreme Court affirming the judgment of the U. S. C. A. and remanding the cause to the U. S. District Court. John T. Fey, Clerk.

9-19-57—Filed amended motion for new trial on the ground of newly discovered evidence. (See Original motion filed on 11-28-56). (Papers given to Mr. Charlson).

9-19-57—Filed amended motion for new trial on the ground of newly discovered evidence. (See Original motion filed on 9-23-56). (Papers given to Mr. Charlson).

11-19-57—Filed Transcript of record of proceedings, dated 9-30-57.

Docket Entries

Date	Proceedings
12-16-57	Filed Opinion #23986 by McGohey, J. The defendant's motion to set aside his conviction and for a new trial is in all respects denied. It is so ordered.
12-18-57	Filed Order on Mandate—Order of the Supreme Court of the U. S. made judgment of the District Court. Deft. to surrender Dec. 23, 1957 at 3:30 PM. McGohey, J.
12-23-57	Deft. oral motion for bail. Pending appeal denied. Deft's. surrender stayed until 1-6-58. Deft. continued on bail. McGohey, J.
12-23-57	Filed notice of appeal from order dated 12-16-57.
12-27-57	Filed Transcript of record of proceedings, dated Oct. 7, 8, 9, 10, 11, 14, 15, 16, 22, 1957.
12-30-57	Filed Transcripts of record of proceedings, dated Dec. 23, 1957 & Dec. 26, 1957.
1- 2-58	Filed Opinion #24021 by McGohey, J. The opinion filed 12-16-57 #23986 contains a typographical error in the 3rd line of the last paragraph on page 23. The figure there stated as $10,400. should be $104. The opinion is herewith corrected accordingly. It is so ordered. McGohey, J.
1-20-58	Filed Transcript of record of proceedings, dated Aug. 23, 1957 and Sept. 24, 1957.
1-20-58	Filed further amended motion for new trial on the Ground of newly discovered evidence.
1-20-58	Filed government's affidavits in opposition to motion to set aside conviction.
1-20-58	Filed receipt—Morris Shilensky, Esq. picked up defense exhibits A, D, I, K, L, Q, P, and R from Judge McGohey's chamber.
1-20-58	Filed stipulation designating parts of the record, proceedings and evidence to be included in the record on appeal.

Notice of Motion for New Trial

(Record, page 1386)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon the affidavits of defendant, Frank Costello, duly sworn to November 28, 1956, and Edward Bennett Williams, duly sworn to November 27, 1956, and upon all the proceedings heretofore had herein, the defendant will move this Court pursuant to Rule 33 of the Federal Rules of Criminal Procedure at a Stated Term thereof for the hearing of motions in criminal causes to be held in Room 318 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 17th day of December, 1956, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting a new trial to the defendant on the grounds set forth in the annexed papers, and for such other, further and different relief as to the Court may seem just and proper.

Dated: November 28, 1956.

Notice of Motion for New Trial

Yours, etc.,

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.

HAYS, ST. JOHN, ABRAMSON & HEILBRON,
By: MORRIS SHILENSKY,
A Member of the Firm,
120 Broadway,
New York 5, N. Y.,
Attorneys for Defendant.

To:

HON. PAUL W. WILLIAMS,
United States Attorney,
United States Court House,
Foley Square,
New York 7, N. Y.

Motion for New Trial on the Ground of Newly Discovered Evidence

(Record, pages 1387-8)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Comes now the defendant by his attorneys and moves the Court to set aside the verdict returned in the above-entitled action on May 13, 1954, and the judgment entered thereon on May 17, 1954, which judgment became final on March 5, 1956, upon affirmance by the Supreme Court of the judgment of the Court of Appeals for the Second Circuit, entered April 5, 1955, affirming this Court's judgment, and to grant a new trial on the ground of newly discovered evidence of which defendant was ignorant at the time of trial herein and which he could not have discovered sooner in the exercise of due diligence.

1. Said newly discovered evidence is neither merely impeaching nor cumulative but is of such character that if received it would show that the United States' case in this prosecution comprised material evidence obtained through the use of information gained by tapping the wires of defendant's telephone and hence inadmissible in this Court. Without said evidence in the United States' case, the jury would probably have reached a verdict of acquittal.

2. Said newly discovered evidence is further of such character that if received it would show that the United

States had available to it the content of intercepted private telephone conversations between defendant and his counsel concerning their preparation of his defense herein, which denied to defendant the effective assistance of counsel and the fair administration of justice.

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.

HAYS, ST. JOHN, ABRAMSON & HEILBRON,
By MORRIS SHILENSKY, a Partner,
120 Broadway,
New York, New York.

Affidavit of Frank Costello

(Record, pages 1401-2)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I, FRANK COSTELLO, defendant herein, presently residing at the Federal House of Detention, West Street, New York, New York, upon my oath do depose and say as follows:

1. At no time before or during my trial in the above-entitled action or during the time in which appeals were

pending therein did I have knowledge or information that any federal agent made use of information obtained through wire taps maintained on my telephone for the purpose of preparing or prosecuting this action. I did not have knowledge or information that wire taps more extensive than those maintained on my telephone for purposes of an indictment in 1926 alleging violation of the National Prohibition Act and those with which I was confronted as a witness in certain New York proceedings, involving matters of New York law, and by the so-called Kefauver Committee in 1951, involving matters of alleged organized crime in interstate commerce, had in fact been maintained on my telephone.

2. The first information that I had that more extensive wire taps might in fact have been maintained on my telephone and that federal agents had used information obtained by wire taps in preparing and prosecuting the above-entitled action came as a result of conversations with my counsel, Edward Bennett Williams, sometime in the late summer of 1956.

3. Before and during the trial herein I held innumerable conferences, by means of my personal telephone, with my counsel, Joseph Leary Delaney, Esquire, Leo Fennelly, Esquire, and George Wolf, Esquire, concerning the preparation and presentation of my defense herein, which conversations I now have information and belief were intercepted.

FRANK COSTELLO.

(Sworn to November 28, 1956.)

Affidavit of Edward Bennett Williams

(Record, pages 1403-6)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

DISTRICT OF COLUMBIA, ss.:

I, EDWARD BENNETT WILLIAMS, 1000 Hill Building, Washington 6, D. C. counsel for the defendant, upon my oath do depose and say as follows:

1. On June 6, 1956, I was retained to represent the defendant in Civil Case number 79-309 on this Court's docket, a denaturalization proceeding brought against him by the United States unrelated to the instant proceeding. During the course of my preparation for trial in that case, it became apparent that the United States had instituted that proceeding and built its case therein by the use of information gained by wire taps on the defendant's telephone. During the trial of that case, it was shown that the requisite affidavit of good cause for institution of the proceeding was based on Hearings before the Special Committee of the United States Senate to Investigate Organized Crime, 82d Cong. (1951), the minutes of the Second September, 1943 Grand Jury of New York County, and the transcript of the disciplinary bar proceedings conducted before the Hon. Charles B. Sears (1943)—all of which made extensive use of information gained by wire taps maintained in 1943 on defendant's telephone by the office of the

New York District Attorney for New York County. Accordingly, the denaturalization proceeding was dismissed without prejudice in an opinion and order dated October 23, 1956.

2. As a result of my investigation and preparation for trial in the aforementioned denaturalization proceeding, I began to suspect that considerably more extensive wire tapping of defendant's telephone had been undertaken by the office of the New York District Attorney for New York County than appeared from the face of the records in the three above-mentioned public documents on the basis of which the denaturalization proceeding had been instituted and, further, that information so obtained could have been of such character as to be useful to the United States in this prosecution. I communicated this information to the defendant, who told me that he had no previous knowledge or reason to know that more extensive tapping had occurred or that it had been made use of by federal agents in preparing or prosecuting the instant criminal proceeding. He nevertheless requested that I continue the investigation of the use of information obtained by wire tapping his telephone and to seek a new trial in the instant proceeding should it appear that the United States' case herein comprised evidence obtained through the use of information gained by such wire tapping.

3. Since the conclusion of the aforementioned denaturalization proceeding, I have continued diligently to investigate the extent of wire tapping on defendant's telephone and the extent of use of information gained thereby in the preparation and prosecution herein. I have conducted this investigation largely by means of personal interviews with federal and New York County agents and officials, and with other private persons. It is my belief that these

interviews have proved successful at least in part because of the public encouragement in effect afforded them by the aforementioned denaturalization judgment.

4. It is my information and belief that the office of the New York District Attorney for New York County has continuously maintained wire taps on defendant's telephone for a period at least beginning on May 7, 1943, and continuing at least until his conviction herein on May 13, 1954.

5. It is my information and belief that records of, and other information concerning, defendant's private telephone conversations obtained by the aforementioned wire taps maintained by the office of the New York District Attorney for New York County were turned over by that office to agents of the United States for use in the preparation and prosecution of the indictment and trial herein.

6. It is my information and belief that the records and other information so obtained were made use of by agents of the United States in the preparation and prosecution of the indictment and trial herein.

7. It is my information and belief that the evidence introduced by the United States at defendant's trial herein that was obtained through the use of information gained by wire tapping his telephone was highly relevant and material in leading to his conviction. It is my information and belief that such evidence was used as an aid to establish the defendant's expenditures during the tax years for which he was indicted and convicted. Establishment of the defendant's expenditures was a necessary element of the United States' case herein, for conviction was obtained through use of the so-called "net worth" method. Further, it is my information and belief that such evidence so obtained aided the agents of the United States at the trial in connection with the establishment of "net worth" figures for defendant.

Affidavit of Edward Bennett Williams

8. It is my information and belief that records and other information obtained by the aforementioned wire taps maintained by the office of the New York District Attorney for New York County and made available to and used by agents of the United States as aforesaid included intercepted conversations between defendant and his counsel, Joseph Leary Delaney, Esquire, Leo Fennelly, Esquire, and George Wolf, Esquire. Said conversations occurred before and during trial herein and concerned the preparation and presentation of defendant's defense.

9. Supplemental to this affidavit, it is my intention, should the facts herein stated be controverted, to subpoena at the hearing on this motion such witnesses as will further establish the truth of the facts herein stated.

10. This motion is made pursuant to Rule 33 of the Federal Rules of Criminal Procedure, and no such motion has been previously made herein.

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.,
Attorney for Defendant.

(Sworn to November 27, 1956.)

Amended Motion for New Trial on the Ground of Newly Discovered Evidence

(Record, pages 1408-9)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Comes now the defendant by his attorneys and moves the Court to set aside the verdict returned in the above entitled action on May 13, 1954, and the judgment entered thereon on May 17, 1954, which judgment became final on March 5, 1956, upon affirmance by the Supreme Court of the judgment of the Court of Appeals for the Second Circuit, entered April 5, 1955, affirming this Court's judgment, and to grant a new trial on the ground of newly discovered evidence of which defendant was ignorant at the time of trial herein and which he could not have discovered sooner in the exercise of due diligence.

1. Said newly discovered evidence is neither merely impeaching nor cumulative but is of such character that if received it would show that the United States' case in this prosecution comprised material evidence obtained through the use of information gained by tapping the wires of defendant's telephone and hence inadmissible in this Court. It would further show that the United States' case in this prosecution comprised material evidence obtained through the unlawful interference with the defendant's mail in violation of 18 U. S. C., Sections 1701, 1702 and 1703, and the

Amended Motion for New Trial on the Ground of Newly Discovered Evidence

Fourth Amendment to the Constitution of the United States, all of which evidence was inadmissible in this Court. Without said evidence in the United States' case, the jury would probably have reached a verdict of acquittal.

2. Said newly discovered evidence is further of such character that if received it would show that the United States had available to it the content of intercepted private telephone conversations between defendant and his counsel concerning their preparation of his defense herein, which denied to defendant the effective assistance of counsel and the fair administration of justice.

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.

HAYS, ST. JOHN, ABRAMSON
& HEILBRON,
120 Broadway,
New York 5, N. Y.,
Attorneys for Defendant.

Further Amended Motion for New Trial on the Ground of Newly Discovered Evidence

(Record, pages 1410-12)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Comes now the defendant by his attorneys and moves the Court to set aside the verdict returned in the above entitled action on May 13, 1954, and the judgment entered thereon on May 17, 1954, which judgment became final on March 5, 1956, upon affirmance by the Supreme Court of the judgment of the Court of Appeals for the Second Circuit, entered April 5, 1955, affirming this Court's judgment, and to grant a new trial on the ground of newly discovered evidence of which defendant was ignorant at the time of trial herein and which he could not have discovered sooner in the exercise of due diligence.

1. Said newly discovered evidence is neither merely impeaching nor cumulative but is of such character that if received it would show that the United States' case in this prosecution comprised material evidence obtained through the use of information gained by tapping the wires of defendant's telephone and hence inadmissible in this Court. It would further show that the United States' case in this prosecution comprised material evidence obtained through the unlawful interference with the defendant's mail in violation of 18 U. S. C., Sections 1701, 1702 and 1703, and the

Further Amended Motion for New Trial on the Ground of Newly Discovered Evidence

Fourth Amendment to the Constitution of the United States, all of which evidence was inadmissible in this Court. Without said evidence in the United States' case, the jury would probably have reached a verdict of acquittal.

2. Defendant alleges that the federal income tax returns of the prospective jurors were examined by the government prior to trial. Defendant avers that this action by the United States alone warrants the granting of a new trial in that he was deprived of an impartial jury within the purview of the Sixth Amendment to the Constitution of the United States and that he was tried by a jury which did not represent a true cross-section of the community, and that the practice engaged in as hereinabove alleged should be condemned as a governmental intimidation of all prospective jurors.

3. Said newly discovered evidence is further of such character that if received it would show that the United States had available to it the content of intercepted private telephone conversations between defendant and his counsel concerning their preparation of his defense herein, which denied to defendant the effective assistance of counsel and the fair administration of justice.

Dated: October 9, 1957.

EDWARD BENNETT WILLIAMS,
1000 Hill Building,
Washington 6, D. C.

HAYS, ST. JOHN, ABRAMSON
& HEILBRON,
120 Broadway,
New York 5, N. Y.,
Attorneys for Defendant.

Excerpts From Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C-141-9

—o—

UNITED STATES OF AMERICA,

vs.

FRANK COSTELLO,

Defendant.

—o—

Before:

HON. JOHN F. X. McGOHEY, *D.J.*

New York, N. Y.
June 13, 1957,
10:30 o'clock a.m.

Appearances:

PAUL W. WILLIAMS, Esq., United States Attorney, for the Government:

By ARTHUR H. CHRISTY, Esq., and
ROBERT K. KUSKIN, Esq.,
Assistant United States Attorneys.

HAYS, ST. JOHN, ABRAMSON & HEILBRON, Esq.,
MORRIS SHILENSKY, Esq., of Counsel; and
EDWARD BENNETT WILLIAMS, Esq., and
THOMAS A. WADDEN, Esq.,
Attorneys for Defendant.

[2] The Clerk: In the matter of the United States of America vs. Frank Costello.

Are you ready, gentlemen?

Mr. Christy: Ready for the Government.

Mr. Williams: Ready for the defendant.

Mr. Christy: Your Honor, before we go into this hearing, the Government would request an opportunity to be heard at this time in connection with a motion by the Government to dismiss the motion of the defendant Costello on the papers which have been submitted to the Court. I believe the Court is aware of law which permits a judge to decide a motion of this nature on the papers, and the Government would submit that, on the papers of the defendant Frank Costello, the Court could very easily and should dismiss this motion, and the Government alleges three reasons for this.

The first is that the moving papers of the defendant fail to allege any facts for which a hearing should be held. The Court is undoubtedly aware of the decision in the Nardone case, and in that case the Court said—the Supreme Court said—that the defendant must show that his line was tapped and also that a substantial portion of the [3] case against him was developed from those taps.

I call the Court's attention to the fact that at no place in the moving papers of Costello does he refer to any evidence that was adduced against him in his prosecution which in fact stemmed from wiretaps. At no place in his moving papers does he allege that federal officers ever tapped his line and at no place does he allege that federal officers ever participated or instigated any tap put on Costello's lines by the state officers. Particularly I refer to the New York County District Attorney's Office. In fact, there is nothing but surmises and suspicions contained in the moving papers of Costello, as I am sure the Court is aware, and it is the Government's position at this time that Costello

clearly has made no prima facie showing, certainly within the ambit of the rule of Nardone, that any wire tap evidence was used against him in this trial and, since there are no factual allegations contained in the moving papers relating to illegal use of evidence, the motion should be denied for that reason.

[4] The second reason is that Costello clearly has not been diligent in bringing this motion.

As this Court is aware, the various appellate courts have said that they do not favor motions for new trials on after-discovered evidence, and in arriving at these decisions they have set forth various criteria by which these motions should be governed.

Among those are that the evidence was newly-discovered and that the motion papers must contain factual allegations from which due diligence on the part of the movant may be inferred.

Now, the only wire taps referred to in the moving papers are those which were put on Costello's telephone by the New York County District Attorney's office, and certainly these wire taps are now and have been for many years a matter of public record. The references were contained in the Aurelio hearings in 1943 and in the so-called Kefauver hearings in 1951, and now, almost three years now—it was two and a half years when these papers were served—two and a half years after the conviction Costello comes into this court and says that he did not know "more extensive" wire taps had been maintained.

In all of the papers submitted by Costello [5] there is no reference in any way to any more extensive wire tapping than is now a matter of public record. During the last 7 or 8 years or even going back to 1943, at all times Costello has been represented by able counsel, and men who are familiar with practice, the criminal practice. And Costello was certainly aware, or has been aware since 1943,

that his lines were tapped. In fact, in 1951, before the so-called Kefauver hearings, his attorney at that time George Wolf, spoke up about the wire taps that had been put on Costello's phone in 1943 and—

The Court: When was this, you say?

Mr. Christy: In 1951, before the so-called Kefauver hearings—then attorney, George Wolf, sought to bar any reference to wire tap information in those hearings. So certainly not only Costello but his attorneys have been aware at all times that his lines were tapped or had been tapped by the New York County District Attorney's office. And certainly I think the Court can say that Costello has not been duly diligent in bringing this motion at this time some two and a half years after his conviction.

The third reason is that assuming, arguendo, that he has properly raised the issue of wire tapping [6] at this point, the only wire taps referred to in the moving papers are those put on by the New York County District Attorney's office.

As I said a minute ago, he does not allege that federal officers tapped his lines. He does not allege that federal officers participated in these taps, and under the decision in May of this year, in the case of United States v. Benanti, in the Circuit Court of Appeals for this circuit, that court rules that evidence obtained or leads obtained from state-maintained wire taps, in which federal officers did not participate, was admissible in the federal court.

So therefore, even on these papers, Costello has not alleged any facts which would warrant this Court in granting a hearing, and for these reasons the Government respectfully prays to this Court that the motion should be denied on the papers.

The Court: I will hear Mr. Williams.

Mr. Williams: If the Court please, as I understand Mr. Christy's position, he says to your Honor at this point that,

first, the allegations that we have made concerning wire taps in the affidavits which have been annexed to our motion are not effectual enough to support a hearing on the motion.

[7] He says, secondly, that we have not come to court in timely fashion, and, as I understand, thirdly, he says that the decision of the Second Circuit Court of Appeals on May 6th of this year, in the Benanti case, is controlling here.

I would like to address myself, if the Court please, to, first of all, the first point in correlation with the third, because I think they are very closely related.

We have alleged here, in the affidavits which were filed, if the Court please, back in November of last year, that there was extensive wiretapping of this defendant over a period of years, and we have alleged, if the Court please, that that wire tapping information, the information gleaned as a result of these wire taps, was used to make the case at bar; that the Bureau of Internal Revenue used the information that came as the result of the New York State taps, and some others which we are going to show here in this hearing, if permitted; that they used that information, if the Court please, as a basis for leads to get evidence which was offered affirmatively at the trial of this case.

Now, your Honor, the Court of Appeals in May had before it a wholly different situation. The [8] thrust of our position in this Court, your Honor, is that there has been a violation by the Federal Government of the fourth clause of Section 605 of the Federal Communications Act of 1934.

That clause, in substance, makes it a misdemeanor for anyone, including officers of the Federal Government, to make use knowingly of information which has been derived as the result of the interception of telephonic communications.

Colloquy

We charge in the affidavit that was filed here—and I repeat the charge, if the Court please, and I represent to your Honor that we are prepared to prove it—that officers of the Federal Government did knowingly use information which directly came from the interception of this defendant's telephone conversations over a period of years, and they did this in the teeth of the interdiction of the Federal Statute which makes it a misdemeanor so to do.

Now, your Honor, in the Benanti case, the fourth clause of Section 605 was not even in issue because the factual backdrop of that case was this:

New York police suspected Benanti of trafficking in narcotics. They knew that he was a habitue of a bar known as the Reno Bar on Elizabeth [9] Street, and so they secured a court order from the Supreme Court of New York to put telephone taps on the Reno Bar, expecting that Benanti might use that phone and that they might get information concerning his trafficking in narcotics.

They put a tap on that phone, if the Court please, and sure enough, they did find Benanti talking on that phone and talking about a shipment that he was to make of 11 pieces, to use his language.

And so, acting on in the information that they had gotten from the tap, the State officers made an arrest, I believe the same night, but instead of finding Benanti trafficking in narcotics they found that he had 11 cans of unstamped and therefore untaxed whiskey.

They took this whiskey. It had no interest to them in so far as criminal law enforcement was concerned because it was wholly without their jurisdiction. And they turned the whiskey over to the officers of the Alcohol and Tobacco Tax Unit of the Treasury Department.

Those officers in turn, turned it over to the United States Attorney for the Southern District of New York, and a criminal prosecution was instituted.

Colloquy

But it was not, if the Court please, until [10] the cross-examination of a Government witness by defense counsel that any officer of the Federal Government either connected with the Alcohol Tax Unit or the United States Attorney's office knew that they had evidence in their hand which had as its origin a polluted source, and the Court of Appeals was very, very careful to spell that out in very, very cryptic language so that there could be no mistake about it.

> "It was not", said the Court of Appeals, "until the cross-examination of one of the police officers at the trial that the prosecutor or any of his assistants had any knowledge or suspicion of the fact that there had been a wire tap. It is clear beyond cavil that no federal officer participated in any way in the wire tap or even knowingly offered any evidence which was discovered as a result of the wire tap."

So that case, if the Court please, is wholly separate and apart and distinguishable from the case at bar as it is alleged in our affidavits, because here we proposed to develop a picture before your Honor of conscious cooperation between the Bureau of Internal Revenue, who was the instigating factor behind this [11] case, and the New York County District Attorney's office, and we propose to show that there was a conscious use of transcriptions of telephone conversations of this defendant.

We propose to show further that those transcriptions were the leads for evidence which was offered in the case at bar.

So that the case is wholly outside the scope of the Benanti case as spelled out in the Court of Appeals.

In addition to that, if the Court please, we propose to show to your Honor Federal wire taps in this case which removes it wholly from the factual backdrop of the Benanti case.

Now, addressing myself to the second point raised by Mr. Christy, he says that we are not timely because the defendant knew that there had been conversations of his which were intercepted and Mr. Christy, of course, is right about that, because the fact that his telephone lines had been intercepted became known as far back as 1943.

But that is not the thrust of our position here, if the Court please, at all. While it may well be so that there was knowledge on the part of this defendant of the interception of his telephone lines [11a] by New York State officers acting pursuant to a warrant issued out of the Supreme Court of New York, there was no knowledge, if the Court please, nor was there a suspicion until late in 1956 that there had been the use of this information by the Bureau of Internal Revenue directly in the teeth of the fourth clause of Section 605.

[12] And, of course, a violation of the fourth clause, namely, the conscious use of wire tap information, is just as much a wrongful act as the interception and divulgence of the conversation itself, and that has been so held by the Supreme Court of the United States in the case of Weiss against the United States, where the court, in discussing the whole wire tap statute I believe in 302, U. S., made it abundantly clear that there were four legs to this statute and that a violation of anyone of them was a misdemeanor, the first leg making it a crime for one who is engaged in the business of transmitting or receiving telephonic or telegraphic messages to make improper use of the information derived through his occupation;

The second making it a misdemeanor for anyone to intercept a telephone conversation and divulge the contents thereof;

The third making it a misdemeanor for one not authorized to receive the message to receive it and make use of the information thereof; and

Colloquy

Finally, the fourth leg of the statute, the one on which we primarily rely in this court at the present time, if the Court please, is the leg [13] which says that where one uses information known to have come from a wire tap, that this likewise is a misdemeanor.

I think perhaps it is worth while looking at the exact language of the statute at this time, because it says:

> "* * * no person having received such intercepted communication or having become acquainted with the content, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

Now, your Honor, the moving papers here and the affidavits annexed thereto carefully document the fact that there was no knowledge on our part, on the part of the defendant, that there had been a use of intercepted telephone communications as a predicate for the institution of the case at bar.

The Court: I take it, Mr. Williams, that, [14] if a hearing be granted, you are prepared to demonstrate that?

Mr. Williams: Yes, sir.

The Court: Very well. I mean that part of your proposition. Not only do you claim it but you claim you can establish it.

Mr. Williams: That we can establish that we did not know until late in 1956, shortly before this motion was prepared and filed, that there had been a use of information by the Bureau of Internal Revenue, information gleaned from wire taps.

The Court: Very well.

You recognize also, of course, your obligation to show that it couldn't have been discovered by the exercise of due diligence?

Mr. Williams: Yes, sir. Your Honor, I recognize that so clearly because discovering it now has been—

The Court: You don't have to argue it now. I just want to make sure we are all clear what the targets are.

Mr. Williams: I feel at this time, your Honor, that maybe we are the world's leading authority on how much diligence it takes to get this information [15] and I don't anticipate any trouble in demonstrating that.

The Court: That may be so.

Mr. Williams: Because it has been most difficult to get this information. It has been acquisition of information by extraction and it has been a very, very difficult row to hoe, but I think that we can demonstrate—

The Court: I think that probably doesn't quite meet the point I have in mind and I don't think you think it does either.

Mr. Williams: No, but I did want to suggest to your Honor it hasn't been open information which was volunteered from those people who had it within their knowledge.

The Court: Very well.

Mr. Williams: So, if the Court please, in response to Mr. Christy's proposition, I say that we are prepared to show conscious cooperation between the Bureau of Internal Revenue and various law enforcement authorities of this state in the use of wire tapped information, and I am prepared to show, if your Honor so permits, that we did not have that information and could not reasonably have acquired it [16] prior to the time when this motion was filed and therefore it is timely.

The Court: That is your proposition.

The last point, I think, is quite crucial, as to whether or not at any time prior to the trial of the income tax viola-

tion the defendant could not have done what he is doing now and show at that time what he now proposes to show, and I think that is rather important on the question of due diligence.

Mr. Williams: Yes, sir.

The Court: Very well.

Mr. Christy: May I reply, your Honor?

The Court: You may.

Mr. Christy: Mr. Williams says that he intends to show a cooperation by the Internal Revenue with the New York County District Attorney's Office, and again I say to the Court that the Benanti decision is controlling on the question of whether or not the Federal Government obtained any leads or any evidence which stemmed from the wiretaps put in by the New York State officials.

Now, Mr. Williams hangs his argument on a rather tortured description of the last clause of Section 605 and says that, if at any time wire taps or information [17] therefrom are used, that would poison the tree.

The Court: What is the Code citation?

Mr. Christy: Section 605 of Title 47.

The Court: Very well.

Mr. Christy: And he points to the Benanti decision to say that there the Court did not cover the point or the situation where the Government knowingly used information from wire taps, and he read to the Court that part of the opinion which says that "it is clear beyond cavil that no federal officer participated in any way in the wire tap or even knowingly offered any evidence which was discovered as a result of the wire tap."

Now, this question of use I think can be answered in two ways. One is in the decision in the Benanti case. There the Court, in arriving at its decision, used an analogy of the search and seizure cases and they pointed out that evidence which is obtained in the states illegally is not inadmissible in the federal court and can be used in the federal

court, and they referred to the Byars case at 273 U. S., page 28, and they say:

> "We do not question the right of the [18] Federal Government to avail itself of evidence improperly seized by state officers operating entirely upon their own account, but the rule is otherwise when the Federal Government itself, through its agents acting as such, participates in the wrongful search or seizure."

The Court: But isn't that the point that Mr. Williams makes? He says he is prepared to demonstrate that the latter occurred; in other words, there was an act of participation As a matter of fact, he goes so far as to say he is prepared to prove that there were taps made by the federal officers themselves, as I understand Mr. Williams' argument.

Mr. Christy: That is separate and distinct, your Honor, with regard to proving that the federal officers tapped Costello's telephone, which he does not allege in his papers, but, had he alleged that, I think the Court might properly grant a hearing; but on the question of whether or not he can show that the Internal Revenue or the Treasury Department got any evidence or any leads from taps put in by the state officers, I say that under the Benanti case even if we had, which we do not concede, there would be no point in having a hearing because the Benanti [19] case is decisive on that very point.

He distinguishes the Benanti case by saying that in that case the Government did not know right up until the time of cross-examination that this case had come in as a result of a wire tap, and he says in this case at bar that the Government knowingly used leads from wire tap evidence, and therefore he says that, since we knowingly used it, it is distinguishable from the decision in the Benanti case.

Our position is it doesn't make any difference. Even in the Benanti case, if the Government had known at the time they went to trial that the evidence that they were going to adduce during the course of the trial had stemmed from a wire tap, that the decision in the Benanti case would have been precisely the same, and I think that is very clear from the decision, particularly their analogy to the search and seizure case. And I would also call your Honor's attention on this question of knowingly using to the Supreme Court decision in United States vs. Goldstein in, I believe, 316 U. S., where the Federal Government apparently had had a tap on certain lines.

[20] They, upon the arrest of certain of the defendants, confronted some of these defendants with these taps and as a result of these taps, or having the taps read to them, several of the defendants pleaded guilty and subsequently testified for the Government. A motion was made to suppress their testimony on the grounds that the Government had illegally used wire tap evidence. Their testimony was admitted in the District Court. They were convicted and it went up to the Supreme Court and the Supreme Court affirmed the conviction and said that the use by the Government of this wire tap evidence by which they induced perhaps these defendants to plead guilty and testify was not an illegal use under Section 605, and I say, therefore, your Honor, that it is academic whether or not Mr. Williams can come into court and show that the state officers turned over to the federal officers information which stemmed from these wire taps put in by the state.

Now, on the question of whether or not there was a federal tap, that is entirely different and, as I say again, it is not alleged in the papers.

The Court: As I understand the argument [21] this morning, it has two prongs. One is he is going to show active participation by federal officials in those taps which

were made by the state authorities. That is No. 1.

No. 2, that independent of that, he proposes to show that there were taps made by the federal officials themselves.

Mr. Williams: Your Honor, active participation in a violation of this section, of 605, perhaps states my position.

The Court: I didn't understand you to state it that way.

Mr. Williams: I except to show, if the Court please, through evidence here, that there was conscious cooperation—

The Court: I know that. I understood you to say more than that, that you propose to show active participation in the tapping or the arrangement for the tapping, in addition to the use of the avails of the tap, and that in addition to that you intended to show taps made by the federal officers themselves.

Mr. Williams: Yes, sir.

The Court: Very well.

[22] I view that, then, as this—just a moment—that may be some expansion of what is alleged in the papers and I take it that it is your position that that is a substantial expansion of what is in the papers.

Mr. Christy: A substantial expansion.

The Court: Don't we come, then, to this, that, if the motion were now to be denied on the ground that the papers are defective, all Mr. Williams would have to do would be to serve a new set of papers and make the allegations in them which he now makes on the record here, and we would then have to proceed with respect to the charges as amended?

Mr. Christy: Your Honor, to get back a minute, I think that Mr. Williams should be required to state at this point precisely what he intends to prove.

Colloquy

Now, your Honor asked him a minute ago about participation in the taps by federal officers. As I understand Mr. Williams, he means by "participation" that state officers tapped the lines and, at some later date, perhaps, turned over information from these taps to the federal officers.

Now. if that is the case, I say it is governed by Benanti.

If Mr. Williams intends to show that the [23] federal officers actually participated—by that I mean they either instigated the taps or sat on the taps or monitored them or participated in that fashion—that is entirely different, but I think that Mr. Williams should be required to state to this Court precisely what he intends to prove.

The Court: Well, in so far as I can understand what he stated this morning, that is what he has said he proposes to do.

Mr. Christy: All right, your Honor—

The Court: Now, the only question is whether or not the present motion should be denied with leave to renew and have him serve a whole new set of papers in which he would allege in detail what he has stated on the record this morning, and it seems to me that would be a useless process.

I take it your motion is to dismiss the motion on the papers?

Mr. Christy: That is right, your Honor. The Government moves that the motion be dismissed.

The Court: The motion is denied.

Mr. Christy: Now, your Honor, now that it has been denied, may we get back to this point of what Mr. Williams intends to prove.

[24] As I understand from his argument, he is going to produce witnesses and documentary evidence to show that federal agents had access to wire taps at some later date after the taps had been put on. Now, if that is what

he intends to prove, I say to the Court that that is governed by the Benanti case and it is academic.

The Court: That may be, but I understand—apparently I don't think you understand what I understand his argument to be. I understand he is going to show more than that. I understand his statement this morning commits him to more than that and that I think he has a right to show.

Now, he will show whatever he has. If at that point it is inadequate to sustain his position, I assume that you will be diligent in making the appropriate motion and I shall have to decide whether it is adequate or not, but I don't think that the argument you make now is sufficient to prevent him from going forward with what proof he has to offer. He makes his claim. He either sustains it or he doesn't.

Mr. Christy: Your Honor, I understand that, as you say, he intends to prove more than that, [25] but I say that he should be limited to the "more" and should not be permitted to adduce any evidence which would merely show perhaps that at some date after the taps had been put in the Federal Government had access to them. He should be limited—

The Court: Mr. Christy, I can't make, and I don't intend to make, any such decision in vacuo. I don't know what he is going to prove. He has his claim here. He is going to have an opportunity to prove what it is.

In so far as that is a second motion, or an amendment of your first motion, so that the record will be complete, I will deny that.

Mr. Christy: Your Honor, then may I take up this question of subpoenas?

Mr. Williams has served a great many subpoenas throughout the city, subpoenaed the Alcohol and Tobacco Tax Unit, the Immigration Service, the Narcotics Bureau and the Internal Revenue and the Treasury Department,

all of which subpoenas are under the Federal Government's jurisdiction.

He has also subpoenaed, I understand, Frank Hogan, the District Attorney of New York County, Stephen Kennedy, the Police Commissioner, and Charles [26] Tenney, the Commissioner of Investigations, and all those men are present in court today. We have men from the Narcotics Bureau, the Internal Revenue Service, the Immigration and ATU here, and they are prepared to answer the subpoenas.

With regard to the Treasury Department subpoena and the Internal Revenue Service subpoena, the Government is going to move to quash those subpoenas at this time.

With regard to the other three or four, we have produced the men to answer them.

In addition, we have also produced eight or nine Treasury agents whose affidavits are contained in the Government's papers, and they are in court, too.

Now, that is tying up quite a few people. I wondered if we could work out some arrangement by which some of these men may be on call or on notice so that we do not have all of these government people tied up for some interminable period of time.

The Court: I think you counsel can work that out, and, if it is necessary for me to make any order with respect to the issue—but it would seem to me that in that respect it is no different [27] than any other case where a lot of people are subpoenaed and then allowed to go back to their offices and remain on call.

Will that be agreeable to you?

Mr. Williams: Certainly, your Honor.

Your Honor, on some of the subpoenas, as Mr. Christy has pointed out, there has been a resistance and therefore it wasn't possible for us to examine the documents before this hearing.

Colloquy

It occurred to me, however, that that resistance might dissolve as some of the proof went in, and so I think perhaps, in the economy of time, the best procedure for us to follow, and I suggest this to your Honor, is for us to go forward with some of our oral evidence at this time and then the reasons for our having subpoenaed some of these documents will become more apparent and I think your Honor will be able to rule against a factual backdrop which would be helpful rather than in a vacuum at this point.

However, I don't like to see Mr. Scotti and some of these other people just sitting here.

The Court: They are all nice people.

Mr. Williams: And losing time. [28] I would like to accommodate them and have them excused.

The Court: It is rather a busman's holiday for Mr. Scotti, surely. He is sitting as a spectator in a courtroom.

Mr. Williams: All right. Then if that be the case, we can proceed at this point, your Honor. I think perhaps we should have a rule on witnesses.

The Court: Why don't we do this: Why don't we just take a short recess here for a couple of minutes; I mean in the sense of a recess from speeches out loud for the record, and you and Mr. Christy see if you can't work out a schedule of what witnesses you want and when you want them.

(Short recess.)

[29] Mr. Williams: May I proceed, if the Court please?

The Court: You may.

Mr. Williams: Mr. Mellin, please take the stand.

May we have a rule on witnesses, your Honor, in this proceeding?

The Court: What do you desire, to have all witnesses excluded?

Mr. Williams: Exclusion of witnesses.

The Court: All right. All persons who are witnesses will repair to the witness room.

Mr. Christy: Your Honor, I have at the counsel table with me Mr. Leith and Mr. Murphy, who are Treasury agents, and who may be witnesses. I would like to have them at the table with me during the course of this motion.

The Court: They are assisting you in your work here?

Mr. Christy: That's right, your Honor.

The Court: They may stay.

Mr. Williams: I intended to excuse this gentleman, but I guess he did not understand it.

We will put you on telephone call so you [30] won't have to wait here.

Mr. Melia: Your Honor, may I say something?

I am a deputy commissioner, Aloysius J. Melia, of the Police Department. I don't know if I will turn out to be a witness, but in the interest of saving the time of the Court, if I could not make my argument at this point, I would want permission to make an argument with respect to quashing the subpoena in toto when I did appear.

The Court: You may do so.

Mr. Melia: Later, your Honor?

The Court: When you are called you may make your argument.

Mr. Melia: Thank you, your Honor.

WILLIAM J. MELLIN, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Mr. Mellin, would you state for the record your address at the present time. A. At the present time I live at Red Oaks Mill, Poughkeepsie, New York.

Q. How long have you lived there, sir? [31] A. Nine years, since 1949.

Q. Where did you reside prior to that time? A. I resided at Mosholu Parkway in The Bronx.

Q. How long did you live there? A. About 23, 24 years.

Q. Have you lived in the Metropolitan Area of New York during most of your life, Mr. Mellin? A. All my life in the New York area.

Q. Mr. Mellin, what is your present occupation? A. I am retired from the Treasury Department as a special agent.

Q. How long have you been retired? A. Nine years.

Q. And prior to the time that you were retired where were you employed? A. I was employed in the Treasury Department, the Internal Revenue Bureau of the Intelligence Unit.

Q. When did you first go with the United States Treasury Department? A. June 6, 1920.

Q. Prior to that time where were you employed? A. U. S. Railway Commission.

Q. Were you ever an employee of the Telephone Company of New York? A. I was. I was employed by the telephone [32] company from 1909 to 1913. I done installation work. I done disconnection work, and I also done investigating work, and from there I went to the District Attorney's office of The Bronx, where I was acting as chauffeur and investigator, and after that, about three years after that, I became a regular investigator and from that I went into the United States Railway Commission, doing wire tapping work, and also in the District Attorney's office I done wire tapping work.

Q. When you went with the United States Treasury Department in 1920, to what division were you attached? A. Narcotics.

William J. Mellin—for Defendant—Direct

Q. What did you do for the Narcotics Division? A. I made narcotic investigations; most of my work was dictograph work and telephone taps.

Q. When you say most of—

The Court: What has this to do with the case we have here? Is there any question that the man did wire tap work? Is that the purpose?

Mr. Williams: I want to know what his—

The Court: You may show that he did wire tap work but I find no necessity to review everything that he ever did.

Mr. Williams: All right.

[33] The Court: You may get down now to what is relevant here.

Q. In 1934, as I understand it, you went with the Bureau of Internal Revenue; is that correct? A. That's right.

Q. In the Treasury Department? A. I was transferred from the Narcotics into the Treasury Department.

Q. Were you employed as a wire tapper by the Bureau of Internal Revenue? A. Yes.

Q. How many wires did you tap, to the best of your recollection? A. You mean how many wires did I tap in my life?

Q. In the Bureau of Internal Revenue.

The Court: If nobody else is going to object to this, I will.

A. I—

The Court: Just hold your answer and try to answer responsively to the questions.

Mr. Williams, you may bring this man down to what is relevant here.

Mr. Williams: Your Honor, this becomes—

The Court: I direct you now, Mr. Williams, [34] to proceed to what I have told you to do.

Mr. Williams: Yes, sir.

Q. Directing your attention to 1937, and I want to bring you into relationship with this matter in accordance with his Honor's ruling, did you participate in the investigation of the Costello tax case? A. I did.

Q. Pursuant to the direction of whom did you participate in this case? A. The chief of the Intelligence Unit, Elmer Irey.

Q. Mr. Irey is now alive or dead? A. Right.

Q. Is he alive or dead? A. He is dead.

Q. Who was the head of the Intelligence unit in New York? A. Mr. MacQuillan, and he is dead.

Q. At whose direct order did you participate in this case, MacQuillan or Irey? A. I received my orders from Mr. MacQuillan, who, in turn, had received them from Mr. Irey.

Q. After you received those orders what did you do? [35] A. I proceeded to New Orleans, where I was interviewed by Mr. Burford, who was the agent in charge there at that time on this investigation.

Mr. Christy: Your Honor, I will object to any further testimony along these lines. This apparently refers to another tax case. It does not refer to the one that we are dealing with here. It refers to a case in New Orleans in 1937.

The Court: That may be so, but I cannot tell that at this time.

Overruled.

Q. When you got to New Orleans what were you instructed to do? A. I was instructed to put in three taps.

William J. Mellin—for Defendant—Direct

Q. Did you put those taps in? A. I put one tap in on a fellow by the name of Shushan, and another tap was some kind of a firm, I think the name was Geigerman—

Mr. Christy: Your Honor, I will object to this, as to where he put the taps in. We are dealing with one person here, the defendant Costello. The question is whether or not there were any taps put in on Cosetllo's line, and this is all irrevelant.

The Court: It may be but I will allow it.

[36] A. The case was named Costello, Kastel and Geigerman and some other name. I don't remember what it was but--

Q. Did you put in taps on Costello at the Roosevelt Hotel? A. I put in three taps altogether, two taps on Canal Street, and I brought them out on Calhoun Street in New Orleans, and one tap on the Roosevelt Hotel on Canal Street.

Q. And that was on— A. That was on either Phil Kastel or Frank Costello.

Q. And did you know that they were using the same suite at the Roosevelt Hotel? A. What is that?

Q. They were using the same suite? A. Yes, sir.

Q. After you installed those wire taps in 1937, Geigerman, Shushan, Costello and Kastel, did you monitor the lines? A. No, I did not.

Q. Was that your usual practice? A. That's right.

Q. Or was that extraordinary? [37] A. No, I never monitored the lines. I put the lines in and then they were turned over to somebody else, and I never took the lines out. They might still be in there.

The Court: Mr. Witness, you are going to help me if you will answer the questions without volunteering. You may assume that Mr. Williams is quite

competent in eliciting all the information which he believes necessary. Whether they are in there now or not was not asked of you. You were asked whether you monitored and the answer was no. Please confine yourself to responsive answers. If you had all this investigative experience, you know what I am talking about.

The Witness: Yes, sir, I do.

The Court: All right. Proceed.

Q. You said, as I understood it, you put taps in on Calhoun Street. A. Yes. No, sir, I put it in on Canal Street and brought it out on Calhoun Street.

Q. And what, sir? A. I brought it out on Calhoun Street, brought the receivers out, that is, the listening post.

Q. And were those taps, to your knowledge, [38] monitored by agents of the Bureau of Internal Revenue? A. Yes.

Q. Do you know who monitored those taps? A. I did know but I don't remember their names now.

Q. You have no recollection of their names at all? A. No, no.

Q. How long did you remain down there? A. A week.

Q. And did you use that week in putting in the taps that you described? A. I did.

Q. Would you describe the method by which you put the tap in at the Roosevelt Hotel. A. Let's see. How can I explain to you? I walked into the hotel, found out what room number this wire ran to—

The Court: Is that important, Mr. Williams, how he did it?

Mr. Williams: I want to show, if the Court please, that it was an interception within the purview of the statute which we are dealing with.

The Court: If you think it is necessary to [39] do that, all right. You may go ahead.

Mr. Williams: If your Honor feels that is not necessary, I will waive that.

The Court: No, I don't know. You think it is necessary. I don't know anything about wire tapping.

A. When they give me the telephone number, the extension number, the room number, I went into the basement of the hotel and I located the wire, and I tapped it and brought the wire out in another room in the hotel, and I went in and registered and took that room.

Q. Was this a dictograph or was it a direct tap? A. That was a direct tap, and I had—

Q. Would you explain to his Honor and to me what the difference is, sir. A. Well, a tap would be on the telephone, and a dictograph would be just an electronic instrument that you place in the room and run a wire from it into another room.

Q. But you also put dictographs on telephones, didn't you? A. I went to work and rewired the telephones and made them a telephone tap and made them also a [40] dictograph.

The Court: The first thing you did was to make—you tied one wire onto the telephone wire?

The Witness: That's right.

The Court: And the one you tied on you let out, and that is the one that reached Calhoun Street?

The Witness: Oh, no, not in the hotel. Not in the hotel.

The Court: I thought that was what you were telling us about.

The Witness: No.

The Court: All right.

The Witness: The hotel was different.

Q. First you bring the wire out from the Costello-Kastel room at the Roosevelt. Where did you bring it out? A. I brought the wire out into another room. I bring it out to the hall and run it along the molding of the wall to the room that I would want to use. Now in order to make the telephone also dictograph, I would switch the wires around in the telephone so that when they use the telephone you would hear them, what they had to say, and when they hang up you would hear what they are talking about in the room.

[41] Q. Now you returned then to New York? A. That's right.

Q. And to whom were you assigned in this particular investigation of the Costello tax case? A. In New York?

Q. Yes. A. The first one was Leo Keys. He worked on it and I used to go up and try to get information from different places and I used to get a lot of information from Bill Graffnecker, who was the chief—

The Court: Just a minute. You were asked the question who you worked under and you gave us the name. That is the answer to that question.

The Witness: Well, I thought I would save time.

The Court: Just a minute. Counsel will ask you all the questions that he thinks are necessary.

The Witness: All right.

The Court: I assure you you may rely on Mr. Williams.

Q. You said you worked for Leo Keys. A. That's right.

Q. What was his job? A. He was a special agent, but he was detailed [42] as a group head. He had so many special agents working under him.

Q. Who was the agent directly in charge in New York of the Costello tax investigation? A. MacQuillan.

Q. No. I mean wasn't there a subordinate to Mr. MacQuillan and Keys who was in charge? A. That's right.

Q. Who was that? A. Keys was under MacQuillan.

Q. Did you work with Ronayne? A. I did. Ronayne had the investigation for a while and I worked for him.

Q. Was Ronayne detailed to this particular case? A. He was.

Q. Did you work with Ronayne? A. I did.

Q. At that time you mentioned the name of Mr. Graffnecker. Who was he? A. He was the police officer in charge of the detectives detailed to the County District Attorney's office, District Attorney Hogan's office.

Q. Was Mr. Hogan the district attorney then or was it Mr. Dewey? [43] A. Well, Mr. Dewey might have been the district attorney at that time and later on Mr. Hogan. I just don't remember. That is over twenty years ago.

Q. Did you work in liaison with Mr. Graffnecker in his investigation? A. Yes.

Q. Did you get information from Mr. Graffnecker? A. I got information—

Mr. Christy: Objected to, your Honor.

The Court: Sustained.

Mr. Williams: I am sorry.

Mr. Christy: I objected.

The Court: I sustained the objection.

Mr. Williams: Would your Honor hear me on that?

The Court: Yes. I will allow him to answer. He said that he got information from Graffnecker. That is all right.

Are you going to ask him what he got?

Mr. Williams: I am going to ask him how he got it and what he saw when he got it, your Honor.

The Court: You may do that, but frame your question carefully because the witness is inclined to

be expansive and while I am going to give you the [44] fullest opportunity to explore whatever you think is appropriate, I just don't want to take the time to hear all these historical details that may be interesting but otherwise unimportant.

Mr. Williams: All right. This becomes very important, if the Court please, in the light of what we discussed here this morning.

The Court: You will have the fullest leeway to develop it.

Q. Would you tell the Court how you got the information from Mr. Graffnecker. Did you go to his office? A. I would go to his office and find out what he had received in the line of wire tap information on the Costello case.

Mr. Christy: Your Honor, I object to this as to any information he got from Graffnecker, who was in the New York County District Attorney's office.

The Court: He is not giving us information. He is telling us what he did. He said he went to talk to this man in the District Attorney's office and got information. I told Mr. Williams—and I am sure he understands it—and also the witness, that the information he got at this time is not to be brought [44a] out until a proper basis is laid.

Mr. Williams: Yes.

The Court: Mr. Williams understands. This is all right. The objection is overruled.

[45] Q. Now, did you see the transcripts of telephone conversations at that time? A. I did.

Mr. Christy: I object to that, your Honor.

The Court: Overruled.

Q. Did you see the transcripts of telephone conversations in which Costello was a party?

Mr. Christy: I am going to object to that, your Honor. It is immaterial whether this witness saw those taps or transcripts of taps in the New York County District Attorney's office.

The Court: That may very well be. I will allow it as a basis for something else which I imagine Mr. Williams is going into.

By the Court:

Q. All right, you saw them? A. I did.

Q. Did you read them? A. I read them.

Q. Could you tell from a reading of them they purported to be conversations in which Costello participated? A. I could.

[46] Mr. Christy: May we have a time when the witness was over talking to Graffnecker?

The Court: Yes.

Mr. Williams: He fixed the time as 1937 for this particular line of inquiry.

The Court: Well, I take it Mr. Christy wants to know when in 1937, if it occurred in that year. The witness said he went to New Orleans, he said he came back.

By the Court:

Q. Did these observations or these conversations with Detective Graffnecker take place in 1937? A. They took place from about 1934 to about 1949—1948, off and on.

The Court: All right.

Mr. Williams: Is your Honor through?
The Court: Go ahead.

By Mr. Williams:

Q. I am addressing myself particularly at this moment, Mr. Mellin, to conversations that you had with Mr. Graffnecker when you were seeking information in 1937 when you were working for Mr. Ronayne, and I have asked you whether or not you were shown transcriptions of the telephone conversations of Mr. Costello, and I [47] understood you said "yes." A. That's right.

Q. Did you make digests of these conversations? A. I didn't. I turned whatever information I got, that is, I would probably make some notes on it, yes, and then I would turn it over to the group head.

Q. To the group head? A. Right.

Q. Was this the practice you followed at that time? A. I did.

Q. Was this the practice you followed continuously? A. That's right.

Q. During the period thereafter, did you continue to work in this way with Mr. Graffnecker? A. I did.

Q. Mr. Graffnecker continued in the position which he had in 1937? A. Yes.

Q. And that was chief of the— A. He was a lieutenant of the Police Department, detailed to the District Attorney's Office.

Q. And what was his particular function there? A. He had charge of all the detectives assigned [48] to the District Attorney's Office.

Q. And was he in charge of the technical men? A. Yes.

Q. The technical men were the men who installed the wire taps? A. That's right.

Q. Throughout the years 1937 and let's go thereafter, did you continue this practice—

Mr. Christy: Excuse me, your Honor. The "thereafter"; let us have a time now.

The Court: Yes.

Q. 1938.

Mr. Christy: Are you dealing with 1938 now?

Mr. Williams: I will go along year by year, if you insist.

Mr. Christy: I don't insist. I would like to have a time.

By Mr. Williams:

Q. I will address my questions now, Mr. Mellin, to 1938. Did you continue to cooperate with Mr. Graffnecker? A. I did.

Q. Did you—

The Court: By "cooperate," I take it you [49] mean you had these conferences with him from time to time?

The Witness: That's right.

The Court: And that you read data that he had available for you and made notes about it which in turn you brought back to your chief?

The Witness: That's right.

The Court: Very well.

By Mr. Williams:

Q. And these notes you made were on the Costello case? A. That's right.

Q. Did he have transcriptions of telephone conversations in which Costello was a participant? A. Yes.

Q. Did you see those? A. I did.

Q. Did you digest those? A. I did.

Q. Were they likewise turned over to the group chief? A. That's right.

Q. Was the same practice followed in 1939? A. It was.

[50] Q. How frequently would you go there, Mr. Mellin? A. Well, I might go there a couple of times a week, and maybe not go there again for a couple of months.

Q. Was it a steady practice? A. Yes. We were very friendly and I always went to see him. Whenever he had any information he would call me, or I happened to walk in on it and take it down to our office.

Q. Were you kept constantly apprised of the information that the Graffnecker office had as a result of wire taps on Costello? A. Yes, sir.

Q. By reason of this fact, was it necessary for you to put a tap on Costello's line? A. No.

Q. Would you tell the Court why that was? A. I never figured on putting a tap on Costello's wire because I didn't think he would be foolish enough to use his wire and talk about our stuff.

Q. Did you have a ready source of information? A. I did. I didn't have to figure on putting a wire in on him because we were getting our information from Graffnecker.

[51] Q. Now, did you assist Graffnecker in putting wires in at various times? A. No.

Q. Did Graffnecker assist you? A. No.

Q. Was there ever a situation where men were lent to you by the Hogan office or the Dewey office? A. Not to my knowledge.

Q. Do you recall a man by the name of Donato or Crotty? A. Those were a couple of police detectives detailed to Leo Keys when we worked on the Dutch Schultz case and they continued on to the other investigation that Leo Keys had.

Q. Did you install taps, Mr. Mellin, on persons who were suspected of being in communication with Mr. Costello? A. Yes, sir.

Q. Will you tell us approximately how many of those you put on during this period, 1937, 1938, 1939, 1940?

Mr. Christy: Objection, your Honor. I don't think that is relevant at all.

The Court: Overruled.

[52] A. Well, there was one tap I put in a fellow by the name of Schlime up in the Bronx, up on Stebbins Avenue in the Bronx. I don't remember the address.

Q. Was that put in because you thought him to be talking to Costello? A. Yes. He was known to be working for Costello and Phil Kastel.

The Court: Did you get orders from any of your superiors to put in any of those taps?

The Witness: All of them orders was from my superiors.

Mr. Christy: When was this tap put in?

Mr. Williams: Your Honor, I think I ought to be able to conduct this examination without cross-examination in the middle.

The Court: I don't think the witness is being cross-examined but I think it is about time you did fix dates.

Mr. Williams: I directed his attention to this early period at the present time.

By Mr. Williams:

Q. Can you tell us approximately when that was? A. The only thing I can say is it was between 1934 and 1937.

[53] Q. Did you put taps on anyone else in this period

of 1937 or 1938 or 1939, persons who were reputed to be in communication frequently with Mr. Costello by telephone?

The Court: Why don't you ask him where he put them? You see, this question that people were reputed to be in touch with Mr. Costello is an awfully broad question. Here is a man who is just loaded with information which he gives at every opportunity. I find no reason why this should not be done the same as with anybody else.

He said he was working under Mr. McQuillan, he was working under Mr. Keys. He had superiors. If you want to know what they instructed him to do and what he did do, all right.

By Mr. Williams:

Q. I will ask you that direct question, Mr. Mellin. What did your superiors tell you to do in this tax investigation of Mr. Costello during the years that we have been alluding to? A. Well, they told me where to put the wires in, get information about the wires and where I could locate the receiver.

Mr. Christy: Your Honor, I am sorry but I [54] must object. Mr. Williams says "the years we have been alluding to." We were referring to prior to 1937. The last time we were referring to 1937, 1938, 1939 and 1940.

Mr. Williams: 1937, 1938, 1939 and 1940.

The Court: You may start with whatever is the first year and have the witness tell, if he can, what orders he received from his superiors and what he did pursuant thereto, but it is impossible for me to be able to tell and relate these stories to any particular period in question.

By Mr. Williams:

Q. Will you tell his Honor, Mr. Mellin, what your orders were, your general orders from your superior, Mr. Keys or Mr. McQuillan, with respect to this investigation that you were conducting by wire taps in this matter? A. Well, they would give me an order to check on certain wires line on Schlime's wires—

By the Court:

Q. Let me ask you a question, please, Mr. Mellin.

Did you have discretion to go out and tap [55] wires yourself, or did you do that only when one superior ordered you to do it? A. Only when one superior ordered me to do it.

Q. In accordance with that practice, you did at various times install taps on various telephone wires? A. That's right.

Q. If you will start at the earliest period and tell us, first of all, who gave you the order, what order he gave you and what you did pursuant to it, that will help us. You said the year 1934? A. That's right.

The Court: Do you claim that any part of the year 1934 had anything to do with the tax case?

Mr. Williams: Your Honor, I am going with the year in which the tax case began in this court, which was 1937.

The Court: You start with 1937.

By the Court:

Q. You have told us about what you did in New Orleans. Now tell us what orders you got, what you did pursuant to to in 1937. Confine yourself now to 1937. A. Well, I was

in error when I said that Schlime's wire was tapped in 1934. That was during 1937. [56] If I remember correctly, it was after I returned from New Orleans that I tapped Schlime's wire.

By Mr. Williams:

Q. Where was that tapped?

The Court: Pardon me.

By the Court:

Q. And you did that pursuant to an order from either Mr. Keys or Mr. McQuillan? A. Mr. Keys.

Q. All right. Where was the location that you were to install the tap? A. Stebbins Avenue and 163rd Street in the Bronx.

By Mr. Williams:

Q. Did you just put that tap in or did you listen in on it? A. No, I didn't listen. I put the tap in but I didn't listen on it.

Q. Can you tell his Honor what other taps you put in pursuant to orders in this particular investigation?

The Court: May I ask a question at this point, Mr. Williams, please?

Mr. Williams: Sure.

By the Court:

Q. At this time were you devoting yourself [57] exclusively to the investigation of Costello or were you working also on investigations with respect to other persons?

Q. Are you able now to distinguish those taps that you put in with respect to Costello from those that you say you put in with respect to others? A. Well, I will try.

Q. Let me make it a little easier for you. You just mentioned this man Schlime. Are you able to say now that that was an order that related to the Costello investigation rather than another investigation? A. It was related to the Costello investigation.

The Court: Very well.

The Witness: That I know.

The Court: That is all I want to find out.

Mr. Williams: Your Honor, I think it becomes relevant to show the amount of tapping that he was doing at this point. I asked him that question preliminarily, to show the conduct of investigations at this time generally.

The Court: I disagree with you on that. I think that all you need to show and all you are entitled [58] to show is what happened in this case. This is not a general inquisition into the practices of Government agencies, and you will be given the fullest opportunity to develop what was done in this case, but I think it unnecessary to go beyond it at this point. If it becomes relevant and material at some other point to go beyond the area of this case, then I will hear you on that, but at the moment I rule that you must confine yourself to what was done in this case.

By Mr. Williams:

Q. Do you recall whether or not you put other taps on in this case?

The Court: In 1937 now. Let's see if we can't take it by years.

Do you recall any others that you put on in this case? The answer to that would be yes or no. We will get down to the detail.

A. I did put other taps in. I am trying to figure out just—you see, I was working on the Dutch Schultz case as well as working on the Costello case.

The Court: That is the reason I asked you that question before.

A. I am a little confused.

The Court: We want you to confine yourself [59] to what you did in this case.

By Mr. Williams:

Q. Were you working in cooperation with Mr. Graffnecker at this time? A. I always would stop in and see Graffnecker or he would come over to our office. If I run up against anything where I couldn't get through or if I ran across that there was a wire already in on a party—

The Court: Now, Mr. Witness, will you please stop giving us the long historical lecture and confine yourself. You were asked if you continued to cooperate with Graffnecker and you said you did. That is the answer to that.

Mr. Williams, we will be here all summer if we don't stay on the target.

Q. Would you tell the Court whether or not Mr. Graffnecker's files of transcribed telephone conversations of the

defendant Costello were made available to you in the years 1938 and 1939? A. Yes.

Q. Was that true in 1940? A. Yes.

Q. Was it true in each of the years between [60] 1940 and 1949? A. Yes.

Q. Did you see transcribed telephone conversations of this defendant during each of those years? A. I did.

Q. Were you acting pursuant—

The Court: You mean tapped by Graffnecker?

Mr. Williams: Yes.

The Court: I just want to follow that testimony.

By Mr. Williams:

Q. Were you seeing these transcribed telephonic conversations pursuant to the direction of your superiors? A. That's right.

Q. Were you taking the information from these transcriptions back to your superiors? A. I did.

Q. Were you digesting these transcriptions? A. I did.

Q. And did this constitute a habitual method of investigation by you in this matter? A. Yes, sir.

Q. Did there come a time when you worked under [61] an agent named Whitman Cordes? A. Yes, sir.

Q. Was Cordes put in charge of this case? A. Yes, sir.

Q. Did Cordes direct you to get information from Mr. Graffnecker?

Mr. Christy: May I have a time?

The Court: Sustained.

Q. What was the time on that? A. That was in 19—

Q. 1946? A. 1948.

By the Court:

Q. Up to that time you had been working under Mr. Keys, had you? A. No, under Ronayne. First Keys—

Q. First Keys. Keys was from 1939 until when? A. Keys was from 1934 to about 1940. He passed away.

Q. From 1940 Ronayne? A. I think it was Ronayne from 1940 to the time that Whit Cordes took it over.

Q. When was that? A. That was from 19—Whit Cordes took it over [62] about 1947.

Q. C-o-r-d-e-s, is that spelled?

Mr. Williams: C-o-r-d-e-s.

By the Court:

Q. And you continued in this, I think you told us, up until but not after 1949? A. That's right.

Q. As far as you are concerned, Cordes was on it in approximately 1947 and 1948? A. Yes.

By Mr. Williams:

Q. Keys and McQuillan were still the two chiefs in the office up to 1946? A. Keys passed away around 1940.

Q. McQuillan was still the chief? A. Yes, sir. He was there until about 1945.

Q. 1945? A. Yes.

Q. And then he retired? A. That's right.

Q. So that you were taking your orders up until 1945 from Keys—from McQuillan, who was the chief; is that right? A. Up to 1945.

[63] Q. And prior to that time you were working directly under Keys; is that right? A. That's right.

Q. He passed away in 1940? A. About 1940, 1941, yes, sir.

Q. Then Mr. Cordes took charge of the Costello case himself? A. Not after Keys. Ronayne.

Q. I said 1946. A. Yes, 1946.

Q. When Mr. Cordes took charge of the Costello case, did you continue under his orders to confer with Mr. Graffnecker? A. I did.

Q. Did you go to Mr. Graffnecker's office? A. Yes.

Q. Were transcriptions of Costello's telephone conversations made available to you? A. There was some information that I got from Graffnecker during that year that I turned over to Cordes.

The Court: Just a minute. Were they transcriptions or what purported to be transcriptions of telephone interceptions?

[64] The Witness: Yes, sir, on the Costello matter, but I don't remember as to what it was all about. So I arranged for Cordes to meet Graffnecker because I expected to retire in 1949.

By Mr. Williams:

Q. Did Cordes in fact meet Graffnecker at your instance? A. He did.

Q. Did you introduce them? A. I did.

Q. Did you continue in 1947 to get information from Mr. Graffnecker from transcriptions of telephonic conversations of Costello? A. 1947, yes.

Q. And did you make that information available to your superior—Mr. Cordes? A. Yes.

Q. Was the Costello case under active investigation at that time? A. I never knew—it was. I will say it was.

Q. It was Cordes who specifically was assigned to this case; is that correct? A. Yes, sir.

Q. In 1946 did you put another tap in on someone [65] who was suspected of talking to Mr. Costello? I have

reference to Schoenbaum? A. That was the accountant. Yes, I did. That was in 1948 I put that tap in.

Q. 1948? A. 1948.

Q. During this period of 1947 and 1948, were you in communication with Mr. Graffnecker— A. I was.

Q. —of Mr. Hogan's office? A. I was.

Q. And was he following the same pattern— A. Yes.

Q. —of showing you his transcriptions? A. Right.

Q. Can you give the Court some idea as to the volume of these transcriptions? A. No.

Q. Were there many of them? A. There was many of them, certainly, a lot of them.

Q. And these were transcriptions of conversations from Costello's home? A. That's right.

[66] Q. At 115 Central Park West? A. That's right.

Q. Were there transcriptions of Mrs. Costello contained therein? A. No, I don't remember anything about that.

Q. But you remember transcriptions of Costello? A. That's right.

Q. Did this continue in 1949? A. Well, I don't know. I retired in January, 1949.

Q. So that you can only tell us up through 1948; is that correct? A. That's right.

Q. During all this period, Mr. Mellin, did you have any duties at the Bureau other than—

> The Court: Mr. Williams, I know that in Washington and other places where you practice counsel sit during their examination. Here we don't follow that practice.
>
> Mr. Williams: I sat to read this note for a moment. I am sorry.

Q. Did you at any time train someone to take over your job? A. I did.

Q. When you left? A. I did.

Q. Who was that, sir? A. An agent by the name of Tom Cahill.

Q. His name was Thomas — A. Cahill.

Q. C-a-h-i-l-l? A. That's right.

Q. Did you train anyone else as a successor? A. I trained another agent by the name of Richard Joyce how to operate a dictograph set.

Q. Would you spell that for us? A. J-o-y-c-e.

Q. Richard Joyce; is that right? A. Right.

Q. You said you trained him how to operate a dictograph? A. That's right.

Q. Was there a time when you installed a dictograph at the Lexington Hotel? A. There was.

Q. And was that in the Costello investigation? A. Well, I never did know as to why I installed a dictograph there, but these agents—it was Sullivan, [68] the agent that asked me to do the job, but I took it that it was on Costello because he was—

Mr. Christy: I object to that, your Honor.

The Court: Sustained.

A. He was known to have an office.

The Court: Sustained.

Mr. Williams: I am going to tie this in later, if the Court please.

The Court: I think it would be a pretty good time to tie it in when you are going into it.

Mr. Williams: This witness doesn't have all the necessary knowledge to tie it up with this case.

The Court: That is it exactly. You have enough from him. He has a dictograph in there. He says he doesn't know what it was for. He said he was told to put a dictograph in the Lexington and he did it.

If you can tie in in later with this investigation, you can do so. What is the use of having this man speculate as to what he did? He did what he was told.

By Mr. Williams:

Q. What sort of dictograph did you put [69] in at the Lexington? A. I rewired the telephone in the room and made the telephone a dictograph.

Q What effect did that have? Did it pick up all the sounds in the room and the sounds over the phone? A. Yes, sir.

Q. And this was in a suite at the Lexington, was it? A. Yes, sir.

Q. What year was that? A. Well, it was before McQuillan retired and that was around 1945. So maybe 1944.

Q. 1944? A. Yes.

By the Court:

Q. Do you know the number of the suite? A. No.

Q. Do you know what floor it was on? A. No.

Q. Do you know what part of the building it was in? A. No.

Q. How many rooms there were? [70] A. I think there was about three rooms, three-room suite.

Q. How many instruments did you attach this device to? A. One.

Q. Was it a bedroom? A. No, it was a living room.

Q. All right. You can't tell us what floor? A. No.

The Court: Very well.

William J. Mellin—for Defendant—Direct

By Mr. Williams:

Q. Did you have access to other information of the nature of transcriptions of telephone conversations from other agencies than the District Attorney of New York in the Costello investigation?

The Court: Pardon me just a minute. Would you rephrase that question.

Mr. Williams: I will rephrase it.

Q. Did you go to other law enforcement agencies, state law enforcement agencies, in the State of New York for information on Costello?

The Court: At any time between 1937 and 1949?

Mr. Williams: Yes.

[71] A. I know I did, but I am just trying to think of what those agencies were. It might have been the New York State Liquor Authority.

Q. Do you recall any instances where you went to the New York State Liquor Authority?

Mr. Christy: I object to that answer, "might have been." Let's have him testify as to what it was.

The Court: The witness says he doesn't know. It might have been anybody. That is sheer speculation.

By Mr. Williams:

Q. Do you recall any instance at this point, Mr. Mellin, of contact with the New York State Liquor Authority? A. Well, we had contacts with the Liquor Authority, we had contacts with the City Commissioner of Investigations and Telephone Company.

Mr. Christy: The question is, your Honor, did this witness have any contacts. I think he should be restricted in his answer to those—to that particular question.

The Court: I will allow it. Please try to answer a little more responsively, [72] Mr. Mellin.

The Witness: I am trying to think as to what agencies I went to get information.

The Court: I know, but when you start to recall those things why don't you do it to yourself and do your own meditation about it, and tell us as nearly as you can whatever in your recollection is responsive to Mr. Williams' question, and then that saves us a lot of time.

By the Court:

Q. Do you recall now getting information from any city or state agencies during this period from 1937 or 1948 with respect to the defendant Costello? A. I do remember—

Q. You do remember getting it? A. I do remember getting information from other agencies.

Q. But now you can't recall which agencies or when? A. That's right.

The Court: All right. Get along, Mr. Williams.

By Mr. Williams:

Q. You have no recollection on that subject at [73] this time? A. No.

Mr. Williams: That's all I have of this witness, your Honor.

Mr. Christy: Your Honor, at this time the Government moves to strike the testimony of the witness on the grounds that he has not testified that he ever

put a tap on Costello's telephone, he has not testified that he ever participated in a tap on Costello's telephone either while he was with the Federal Bureau or with the Treasury Department. He did not participate in a state tap on Costello's telephone and the most that he has testified is that he received certain information which may have stemmed from wire taps from Captain Graffnecker of the New York City Police Deartment.

The Court: He testified that he put in a tap in New Orleans on some office of which Costello was believed by him to be a partner, I think.

Mr. Christy: But he has—

The Court: Is that right?

The Witness: That's right.

The Court: Motion is denied.

[74] *Cross-examination by Mr. Christy*:

Q. Mr. Mellin, when did you go down to New Orleans? A. The latter part of March of 1937.

Q. And how long were you down there? A. About a week.

Q. And at whose instructions did you go down there? A. Elmer L. Irey, chief of the Intelligence Unit.

Q. Irey? A. Yes.

Q. He is no longer living? A. No.

Q. What were your instructions when you went down there? A. I was instructed to see Mr. Burford—

Q. Mr. who? A. Burford.

Q. How do you spell it? A. B-u-r-f-o-r-d, I think he spells it.

Q. Who was he? A. He was the special agent in charge of the investigation of the Costello-Kastel case; and he requested me to put in these taps that I put in. After I put [75] the taps in I reported back to him.

Q. And will you tell us again the taps that you put in? A. Well, I can remember the one, Shushan. I think it was a department store on Canal Street.

Q. Is that Abe S-h-u-s-h-a-n? A. Yes, that might be it. I brought the receiver out—the listening post, rather, out on Calhoun Street, which is right directly in back, the suite in back of the store.

Q. What were the other taps you put in? A. The second tap was also in that neighborhood, but I don't remember what the address was or where it was located but I remember bringing the two taps out in this loft building on Calhoun Street.

Q. In other words, the tap was somewhere on Canal Street? A. That's right.

Q. And on whose telephone was it placed? A. One was Shushan but I don't remember the name of the other one. I think it was on Geiderman.

Q. A person named Geiderman? A. That's right.

Q. Or Geigerman? [76] A. Geigerman.

Q. Were those the only two taps that you placed? A. No. Then I put one in in the Roosevelt Hotel.

Q. Was that in a room in the hotel? A. That's right.

Q. Whose room was that? A. I don't remember. I absolutely do not remember.

Q. What were your instructions with regard to that? A. To put the taps in.

Q. Were you told whose room it was? A. I was.

Q. And whose room was it, do you recall? A. I don't remember.

Q. Did you monitor any of those taps? A. I did not.

Q. You didn't have any instructions to put a tap in on Costello's telephone, did you? A. Where—here in New York?

Q. In New Orleans. A. In New Orleans?

Q. Yes. [77] A. I figured the wire—

The Court: Wait a minute now. Never mind what you figured. The question is did your superior tell you to tap a telephone wire belonging to the defendant Costello. The answer is yes or no.

A. Whether he told me to put a wire in on Frank Costello?

Q. That's right, whether or not you had instructions.

A. The only thing I can say is that I figured those were—

The Court: Never mind what you figured. You were asked what you were told. Please, you understand that question?

The Witness: I understand it, yes.

The Court: Then answer it.

The Witness: It is hard for me to answer it.

The Court: All you have to do is say "I don't remember" or "I can't answer it."

A. I don't remember.

The Court: Very well. Fine. Never mind figuring.

Q. You don't remember if you put a tap in on Costello's [78] telephone down in New Orleans; right? A. I put a tap in; that's all I can say. I put three taps.

Q. Will you answer the question, Mr. Witness.

The Court: Do you know in whose name the telephone that you tapped was registered?

The Witness: The only thing I can tell you, your Honor.

The Court: The answer is yes or no to that.

By the Court:

Q. Do you know the name in which the phone was registered that you tapped? A. I know one name.

Q. All right. A. That was Shushan.

Q. You told us that. In addition to that, do you recall the name in which the phone was registered that you tapped in New Orleans? A. I don't remember the names.

Q. At the time you were instructed to put the tap by your superior, were you given the name? A. I was.

Q. And at that time you knew? A. I did.

[79] Q. But now you do not? A. I do not remember them.

By Mr. Christy:

Q. And you do not recall any instructions about putting a tap on the phone of Frank Costello; is that right? A. I don't remember any such instructions.

Q. And you don't remember putting in a tap on the phone of Frank Costello? A. No.

Q. Did you ever keep any diary or record of the taps that you put in? A. I did.

Q. All through the years? A. From 1930 on.

Q. From 1930 on? A. (Witness nods.)

Q. Does that have in it— A. What's that?

Q. Does that diary have contained in it the name of every tap that you put on? A. It should. Many times I would be asked to put—

The Court. As far as you know, did you [80] record in that diary all the taps that you put in?

The Witness: Yes.

The Court: All right.

By Mr. Christy:

Q. Do you have that diary with you? A. I do not.

Q. When was the last time you looked at it? A. About a week or two ago.

Q. In connection with this case? A. Yes, sir. .

Q. And you didn't find the name Costello in the diary, did you? A. I don't remember.

Q. Wait a minute. You don't remember finding the name— A. I don't remember finding the name Costello, whether any of these wires I put in was registered under the name of Frank Costello. Can I explain something to you?

Q. Will you just listen to the question. You looked at the diary a week ago? A. Right.

Q. Is that correct? A. Right.

[81] Q. And you looked at it in connection with your testimony in this case? A. That's right.

Q. And you were looking for the name Costello, were you not? A. No, I was not.

Q. In looking through the diary, you did not find the name Costello, did you? A. I wasn't looking for that.

Q. I asked you, in looking through the diary, did you find the name Costello? A. I did not.

Q. Where is this diary now? A. In my home.

Q. At any time, Mr. Mellin, when you were working for the Treasuary Department—let's take the period 1934 on—did you ever put a tap on the telephone of Frank Costello? A. No.

Q. Did you ever receive any instructions to put a tap on a telephone of Frank Costello? A. Not that I remember.

Mr. Williams: Your Honor, are we talking about a home phone, because I think this is a little [82] confusing.

The Court: I thought that is what he said. Wasn't it?

Mr. Christy: I said the telephone of Frank Costello.

The Court: I thought you said the home phone.

Mr. Christy: I will ask him again.

By Mr. Christy:

Q. Did you at any time in this period ever put a tap on a telephone of Frank Costello? A. No, I don't remember. I absolutely don't remember.

[83] Q. And I understand that when you did put certain taps in you did not monitor the taps. A. That's right.

Q. So, for example, if somebody asked you to put a tap in on a friend of Costello's you would have no way of knowing whether that friend ever talked to Costello, would you? A. No.

By the Court:

Q. Did anybody ever describe the person whose phone you were to tap as "a friend of Costello"? A. Yes.

Q. Who gave you those instructions? A. Well, Leo Keys, Claggett.

Q. That is the only name you ever were given? A. I didn't quite understand you, sir.

Q. I say, when your superior was instructing you or ordering you to put in taps, did he describe the person whose phone you were to tap as a friend of Costello or did he give you a name? A. He always gave me a name, sure.

Q. Did he thereafter describe him? A. He would describe him. He gave me a name and he would give me his telephone number if he had one.

[84] Q. Did he ever give you an order to tap somebody that he said was an enemy of Costello? A. Yes.

Mr. Christy: I didn't hear that last question, your Honor.

The Court: I asked if he ever gave him a name of a person who was described as an enemy of

Cosello and he said he got that kind of information as well.

The Witness: Yes.

By Mr. Christy:

Q. But you would have no way of knowing after you you put in this tap whether Costello ever talked to the person, would you? A. I had no way of knowing, no.

By the Court:

Q. Was it customary or was it the practice of your superiors, when they ordered you to tap telephones, to give you descriptions of the relation of that person to whomever was under investigation as a friend, an enemy, a relative, a business associate and all like that? A. Yes, sir.

Q. They gave you all those instructions? [85] A. Yes, sir.

Q. You were not required to monitor any of them? A. No, no.

By Mr. Christy:

Q. At the time you went down to New Orleans you were told to report to a Mr. Burford, is that right? A. That's right.

Q. And in connection with what case was that? A. Costello and Kastel.

Q. The Costello and Kastel case? A. And Geigerman.

Q. It had nothing to do with an income tax case against Costello in New York? A. Well, I don't remember. All I can tell you is that I received a letter with those names on it, instructing me to proceed to New Orleans, confer with Mr. Burford, and he would want me to put some wires in, and I did that.

William J. Mellin—for Defendant—Cross

Q. So that was the extent of your work on the case? A. That's right.

Q. You never actually worked on that case or other cases as an Intelligence agent, did you? [86] A. Oh, my title was Intelligence agent.

Q. Well, let us take this case in 1937. A. You mean did I work as a tax man?

Q. Yes. A. No, no.

Q. On the case in 1954, in New York, you did not work on that case either, did you, as a tax man? A. No.

Q. And during the years in which you put in the taps, after you had put the tap in, that was the extent of your work on the case; is that right? A. That's right.

Q. You never turned over to anybody any information gained from the tap? A. From the taps that I put in?

Q. Yes. A. No, no.

Q. In fact, you don't know if any information ever was gained from these taps? A. Don't know anything about it.

Q. Now you testified that you had frequent conferences with Mr. Graffnecker. A. That's right.

Q. When did they commence? [87] A. Well, I knew Bill Graffnecker in 1930, I think.

Q. With regard to the Costello tax case, when did you start talking to Graffnecker? A. On the Costello case I think it was—

By The Court: Do you mean when did he start this practice that he said he had of picking up these taps?

Mr. Christy: Yes.

A. I think it was around 1934, '35, '37 and through there.

Q. 1934—

William J. Mellin—for Defendant—Cross

By The Court:

Q That is really guessing? A. Yes, it is only a guess because I was working on the Dutch Schultz case at the same time.

Q. Well, we got that in now. You told us about that several times. A. I can't just dope out where or from whom I got the information, what the information was about whether it was on this fellow or that fellow, but I was just to contact Bill Graffnecker if I wanted to know anything about Frank Costello.

By Mr. Christy:

Q. Did you ever ask Graffnecker to put a tap in? [88] A. No, I did not.

Q. I think you testified on direct that after you had come back from New Orleans you continued to put in taps. A. I did.

Q. Here in New York. A. Not taps, but a tap.

Q. A tap. That was which one? A. On Schoenbaum, a former Revenue agent.

Q. Didn't you tell us about somebody named Schlime? A. That was—oh, wait a minute. Yes, I think you are right. I think I went in on Schlime after I came back from New Orleans. It was pretty close as to whether it was after I came back from New Orleans or before I went down to New Orleans.

Q. Well, you got back from New Orleans when? A. It was the early part of April 1937.

Q. The early part of April 1937. After you got back to New York I think you testified that you continued to put in taps here in New York; is that right? A. Yes.

Q. For how long did you continue to put in taps? [89] A. I think until we got the order from Washington that we were not permitted to put any more taps in.

Q. When was that? A. It must have been around 1940, something like that, unless we had specific instructions from the agent in charge.

Q. As a matter of fact, Mr. Mellin, you never put a tap in—

By the Court:

Q. You mean by that that prior to that there had been a system of free-lancing, that you made up your own— A. Not my own, but the group heads who were assigned to a case.

By Mr. Christy:

Q. As a matter of fact, you did not put in any taps after 1937, did you? A. Oh, yes I did.

Q. You did? A. Yes.

Q. For how many years did you continue to put in taps?

The Court: Are you talking about a general [90] practice or with respect to Costello?

Mr. Christy: Well, Mr. Williams, has had the witness allude to certain taps that he was asked to put in in the years following 1937 in connection with the Costello case and I am trying to find out about these.

The Court: I thought that on the basis of your objection I had instructed Mr. Williams that we ought to keep to this case and not go into the whole subject, but if you want to—

Mr. Christy: Your Honor—

The Court: Just a moment now, please. If you want to go into this whole question of how the Treasury Department conducted its investigations, I suppose you can go into it if you want.

Mr. Christy: No, I don't, your Honor.

The Court: I had thought in order to keep within a reasonable compass here, so we might finish before we get too old, it might be a good idea if we stayed with this situation.

Mr. Christy: Your Honor, I understand that the witness testified that he put in a tap on a Mr. Schlime.

The Court: That's right.

Mr. Christy: That he put in a tap in 1946 [91] at sometime in connection with the Costello case.

The Court: Yes. You can ask him what you want about the Costello case. My only suggestion to you is that your questions are broad enough to get into the area which I thought I had excluded on the basis of your objection, incidentally.

Q. Now, again, Mr. Mellin, isn't it a fact that you did not put in any wire taps after 1937? A. No, it is not a fact.

The Court: You mean in the Costello investigation?

The Witness: Yes, in the Costello case.

The Court: All right.

Q. Do you remember the Nardone decision? A. I do.

Q. And that came down in 1937? A. That's right.

Q. Didn't you receive instructions that you were not to put in any more taps? A. Not until way after that decision was handed down.

Q. How long after? A. I don't remember.

Q. Was it after this tap that you put in on [92] Schoenbaum? A. I just don't remember. I will tell you, you could settle this very easily by just getting the records from the Intelligence unit and my memorandums that show when I put the taps in and what I did.

William J. Mellin—for Defendant—Cross

Q. Do you remember writing an article in the Saturday Evening Post in 1949? A. I do.

Q. And do you remember saying there, page 57: "I gave it up (referring to wire tapping) after the 1937 ruling as far as federal cases went"? A. That's right, I did.

Q. Well, now— A. But if I got an order from my superior to go out and tap a wire, I did it.

Q. So you were not accurate in the article when you said you gave it up after 1937? A. If a group head would ask me to do it I would refuse to do it and say, "Take it up with Mr. MacQuillan. If Mr. MacQuillan tells me to do it, O. K."

Q. The only tap, then, after '37 in connection with the Costello case was the Schoenbaum one: is that right? A. No, the one in the Lexington Hotel, and the [93] Schoenbaum. The Lexington Hotel was, I think, in 1946.

Q. 1946. And when was the Schoenbaum? A. Those were orders from Washington to go in there.

Q. When was the Schoenbaum one? A. 1948.

Q. What instructions did you get when you went to put the tap in the Lexington Hotel?

The Court: First of all, from whom?

The Witness: The instructions I got from Agent Sullivan. He said that he was instructed by the agent in charge for him and I to go up and put this tap in, that he was going to sit in on it.

Q. That who was going to sit in on it? A. Sullivan. So I went up and put the tap in. I think it was a dictograph and a tap. After I completed that work I left Sullivan and went about my business.

Q. You did not receive instructions to put a tap in on Frank Costello, did you? A. No.

Q. And as far as you know, the tap had nothing to do with Frank Costello? A. You mean in the—

William J. Mellin—for Defendant—Cross

[94] Q. In the Hotel Lexington in 1946. A. As far as I know, no.

Q. As far as you know? A. No, no.

Q. And how about the tap in 1948 that was put in on a man named Schoenbaum? A. That's right.

Q. Did you actually install the tap? A. No, I did not.

Q. You did not install it? A. No, I did not go through the process that I always go through when I put a tap in. I just went to work and hooked in on his line in the basement of the house where he lived, to find out if he was home or out, and if I found out he was not home, why I would hang outside waiting for him to come home, and then follow him from his house to wherever he might go.

Q. So actually you never tapped the line? A. No, no.

Q. That is correct, that you did not? A. That's correct.

Q. Going back to Mr. Graffnecker a minute, you say that from about 19—

The Court: Pardon me just a moment.

By the Court:

[95] Q. Am I wrong in saying that when Mr. Williams asked you about these taps you said you did put one in on Mr. Schoenbaum's wire? A. Yes. It was not an elaborate tap. It wasn't where I strung any wires. I just went down to the basement of the house.

Q. But you were asked if you had put any taps in and you are the expert; you said you did. A. I did, yes.

Q. Now it turns out that it is not what you experts call a tap, but something else? A. That's right.

The Court: Very well.

William J. Mellin—for Defendant—Cross

By Mr. Christy:

Q. Let me go back a minute, Mr. Mellin, and ask you about the tap in the Lexington Hotel. That was a tap and a dictograph? A. As far as I remember. I made a dictograph as well as a tap on the telephone.

Q. So that this device which was hooked up to some kind of another recording device would record conversations which took place in the room; is that right? [96] A. That's right.

Q. It would also record telephone conversations? A. That's right.

Q. So anybody reading or listening to the recording device would hear conversations, and it might be a telephone or it might be people talking in the room? A. Yes, sir.

Q. And somebody listening would not know whether it was a telephone conversation? A. Oh, he would know the difference, certainly. He would know whether it was a telephone call or whether it was just plain dictograph. He would hear the telephone ring. He would hear them answer. Certainly he would know.

Q. But anything that was recorded could have been merely conversation in the room; is that right? A. Well, what was recorded was on the telephone as well as the conversation in the room.

Q. I think you said that you first went to see Mr. Graffnecker about 1934. A. No, 1930.

Q. 1930? A. Yes, sir.

[97] Q. When did you first go to see him and learn of these taps that the State had put in on Frank Costello? A. I would say that was around 1933, '32, '33. See, I was a Narcotics agent then, up to 1934, and the Intelligence unit always—

The Court: Just a minute now. Remember my admonition about the historical data.

The Witness: I know, but I don't know how else to explain this.

The Court: That is all right, but I think that is unnecessary. You told us that you first met this man in, what was it, 1933 or '32?

The Witness: I first met him in 1930, Graffnecker, and I think I spoke to him in 1933 or it might have been '34. I would have to go back to the case that I was working on.

The Court: All right. Is that the Schultz case?

The Witness: Yes.

The Court: You knew him in 1930. All right, go ahead.

Q. When was the first time, or as best you can recall, when you first started talking to Graffnecker [98] about taps on Costello's telephone? A. I just don't remember,

By The Court:

Q. Did you ask him about it or did he tell you that he had it? How did that start? A. I would have to go back to a man who ran for office here in New York in order to refresh my memory.

Q. You mean go back and talk to him? A. No, mention his name here.

Mr. Christy: Your Honor, it seems to me that the question is perfectly simple to answer.

The Court: I am not the witness.

The Witness: You mean as to—

The Court: All I asked you was the subject of the taps of Costello's phone come about because you asked Graffnecker if he had any or did they come about because Graffnecker told you he had some or did they come about because he gave you other taps

in which that name appeared although it wasn't, maybe it was, the Schultz case.

The Witness: Yes, I think the Schultz case was the stem of the whole thing.

The Court: All right. And in connection with that you found out that he had some information [99] gained from wire taps relating to Costello; is that right?

The Witness: That's right.

The Court: And thereafter did he, whenever he got it, did he call you and tell you he had it?

The Witness: He either called me or I called him.

The Court: All right. You first learned about the information in the Schultz case when this man told you that he had the information?

The Witness: That's right.

The Court: All right. Now get along.

Q. When approximately was that? A. Well, the only thing I can say is around 1933, '34.

Q. Was it after you became an Intelligence agent? A. No, it was before I became an Intelligence agent.

Q. So it must have preceded '34? A. That's right.

Q. And then from 1934, we will say, until 1937 were you in frequent contact with Mr. Graffnecker? A. I was.

Q. Would you go to him and ask him for whatever [100] taps he had on Costello's phone? A. I think I did.

Q. Did you do that on your own or at somebody's instruction? A. Leo Key's instructions.

Q. How often would you see Graffnecker? A. Oh, I don't remember. Sometimes I would see him two or three times a week; maybe again I wouldn't see him for a month or so.

Q. And did each time you see him, did he have a new tap for you? A. No, I wouldn't say that. He probably had some taps in or he didn't have some taps in. He would either give me some information or he would ask me about some information which I would give him.

The Court: When you say taps, do you mean that Graffnecker would have what purported to be transcriptions of conversations? Is that what you mean?

Mr. Christy: Yes. Well, I am going to get to that in just a minute, your Honor.

Q. In what form did Graffnecker make this information available? Did he give you an actual transcript of a tap? [101] A. You mean for me to take to my superior?

Q. For you to read. A. For me to read?

Q. Yes. A. Yes, sir.

Q. In other words, the yellow sheet. A. I don't know whether it was the actual transcript that he got from the men that were sitting in on the wires but it was a transcript.

Q. It was an in-out, in-out thing? A. As far as I remember, yes.

Q. Was it a summary of some conversation? A. That I don't remember. I really don't remember that. I would only be guessing at it.

By The Court:

Q. You saw it? A. I saw some of them but I just don't remember how many or how many items he had.

Q. I think the question is what did they look like. A. Some were on yellow pads, some were on white pads.

Q. Were they typed or in handwriting? A. That's right, handwriting.

[102] *By Mr. Christy:*

Q. In handwriting? A. Yes.

Q. Did you have any doubt about what it was? A. No.

Q. Did Graffnecker tell you what it was? A. Yes.

Q. What did he say? A. I know in one instance he told me, "This is on the Frank Costello case." Then he mentioned some other names that I don't want to mention here.

Q. Well, was it a tap on Costello's telephone? A. Yes, yes. That was on the tap of Costello's telephone, yes. He had those wires tapped.

Q. He had them tapped all during this period? A. I don't know how long he had them tapped. How long he had them tapped and how long after he disconnected them would he go back again I don't know.

Q. What I am trying to find out, Mr. Mellin, is how you knew that this sheet or whatever it was he gave you was a tap on Costello's wire. A. He told me so.

Q. What did he say to you? A. I don't remember. I know it was on Costello. [103] He would say something about the Costello case, but just the words he used I don't remember.

Q. In other words, it could have been a tap on somebody else's phone, somebody connected with Costello; is that right? A. It might have been but I took it for granted that it was on Costello's home.

Q. You took it for granted but you don't know? A. No, I don't know.

Q. That was in all these years that you were seeing him. Well, let's say the years '34 to '37, first of all—

The Court: Just a moment, please.

In any of these sheets that you say you saw was there a telephone number listed purporting to be the telephone from which the information was received?

The Witness: No.

Q. It was not? A. No.

The Court: There was nothing on there by which you could tell which instrument was being tapped?

The Witness: No.

The Court: Or when it had been tapped?

The Witness: No. I just took his word for it.

[104] Q. So the fact of it is that in all these sheets that you saw in that period you do not know if they reflected a tap on Frank Costello's telephone conversations; is that right? A. I don't know, no. Only what Graffnecker told me.

Q. You got quite a bit of information from Mr. Graffnecker through the years, didn't you? A. I got information; I don't know just how valuable it was to the agents that were working on the case.

The Court: The question was not as to its value but as to its volume. Did you get a lot?

The Witness: Oh, volume. Yes, I did.

Q. Do you remember our conversation yesterday, Mr. Mellin, on the telephone? A. I had no conversation—oh, with you, yes.

Q. I am Mr. Christy. Do you remember I talked to you? A. Yes.

Q. And I asked you about being over in Mr. Graffnecker's office; do you recall that? A. Yes, you asked me yesterday?

Q. Yes. [105] A. I don't remember whether you asked me that yesterday or not. I think you asked me was I to Mr. Williams' office.

Q. I asked you if you had obtained information from Mr. Graffnecker, or else you told me that you had. Do you remember that? A. No, I don't remember that.

Q. Do you remember talking to Mr. Ruskin about obtaining information from Mr. Graffnecker? A. Yes, I think I did tell him that, yes, but I don't remember talking to you about it.

Q. Do you recall telling Mr. Ruskin that you did not know where Graffnecker got this information that he turned over to you? A. I don't remember saying anything like that, no, sir.

Q. Isn't it a fact that you did tell him that you had obtained a lot of information from Mr. Graffnecker but you just did not know where that information came from? A. If I told him I got information from Graffnecker, I took it for granted that he got that information over the wire taps.

By the Court:

Q. The point of the question is this: When you [106] got information from Graffnecker you did not know of your own knowledge whether it resulted from a wire tap or whether it came from some other source? A. That's right.

Q. That is what you said here a little while ago. A. That's right, that's it.

Q. Did you know who had made the notes, the handwriting on the sheets which you say Graffnecker showed to you? A. I did not.

The Court: All right.

By Mr. Christy:

Q. Now, after 1937 you still continued this liaison with Mr. Graffnecker, right? A. Yes.

Q. And for how long did that continue with regard to the Costello case? A. Well, listen. As I go along, different

things come back to me. Mr. Graffnecker was not in charge of the men in 1932, '33 '34—I think it was after that. I think a man by the name of Dow was in charge of these investigators, and then Graffnecker became in charge.

I don't know what year he came in charge, but I used to see Graffnecker either in the District [107] Attorney's office or up at Police Headquarters and we would exchange our information.

Q. So you did not get any information from Mr. Graffnecker until he took charge; is that correct? A. Oh, no, I got information before he took charge; oh, yes.

Q. That you have just described? A. Yes. I did not quite remember when he took office as the officer in charge.

Q. I am addressing myself to the period subsequent to 1937. For how long after that did you continue this liaison with Mr. Graffnecker? A. After '37?

Q. Yes. A. Right up until I got out, 1948.

Q. 1948? A. I got out January 1949. I worked right up until that time.

Q. During all this period you never asked Graffnecker to put in a tap, did you? A. I did not.

Q. And you never participated in any tap that he or the district attorney put in, did you? A. No, sir, I did not.

[108] Q. Now in this period, '37, to '49, how often would you see Graffnecker? A. As I said before, I might see him several times in one week and then again I might not see him for a couple of months. I don't remember how many times I would see the man. He would call me up or I would call him up. He would come to me or I would go to his office.

Q. And all during these years you would go over there on occasion and he would show you certain sheets; is that right? A. That's right.

Q. These were the same sheets that you referred to a few minutes ago as the ones you saw prior to '37, right?

The Court: The same type.

A. Same kind of sheets; not the same sheets, though.

Q. Yes, the same kind of sheets? A. Yes.

Q. So in the period '37 to '49, when you looked at these sheets, you did not know that they reflected a tap on any of Frank Costello's conversations; is that right? [109] A. Well, the conversations would show, would mention the names.

The Court: That isn't the point of the question. The point of the question—I think you understand it—the question is could you tell whether that conversation came from the tap on Costello's wire, not whether Costello was a participant in the conversation.

The Witness: Oh, I see. No, I didn't know.

Q. You didn't know of your own knowledge? A. No, no. It is only—

Q. So, so far as you are concerned, as you sit there now. Mr. Mellin, you do not know for a fact that you ever saw a transcript of a tap on a conversation of Frank Costello; is that correct? A. Only what he had told me.

Mr. Williams: I submit that this line of inquiry is most immaterial because the law is well-settled that it does not make any difference whether or not it was a phone in the home of the defendant or a phone that he was using in so far as the admissibility of the evidence is concerned, as interpreted by the courts with relation to Section 605.

If he was talking over the phone and his [110] conversation was intercepted, that is all that is important here, and there has been a great deal of interrogation concerning who owned the phone—

Mr. Christy: Perhaps Mr. Williams did not listen to the question, your Honor. I did not relate it to the phone.

Mr. Williams: When the evidence is developed it will, in fact, show ownership of the phone.

The Court: Up to now, if everything that was strictly immaterial had been excluded, we would have a much shorter record, Mr. Williams. That has been going on for a long time. Let us get along.

Mr. Williams: I just wanted to—

The Court: That is argument that you can make at the appropriate time.

Mr. Williams: Yes.

By Mr. Christy:

Q. Let me repeat the question.

The Court: The thrust of your direct examination was that this man had gone about tapping this defendant's telephones and I think this is an appropriate examination to show that that is not what happened, if he can show it. I don't say that he has. Go ahead.

Q. In the years 1937 to 1949, when Mr. Graffnecker [111] showed you these various sheets, as you sit here today you do not know of your own knowledge that any of those sheets reflected an intercepted conversation of Frank Costello? A. Yes, they were. I wouldn't go over to see the man and get the information if it wasn't on that account.

The Court: That is a non sequitor. That is neither here nor there. The question is did you do it.

The Witness: I did.
The Court: Did you see it?

Q. You saw certain sheets?

The Court: Did you see sheets that indicated that Costello was a participant in the conversation that was recorded?
The Witness: Yes, yes.
The Court: All right. That is all.
The Witness: Absolutely. I wouldn't be interested in the thing—

Q. How do you know? A. By looking at it.
Q. Was there a telephone number on it? A. I don't remember that.
[112] Q. You mean your only knowledge, Mr. Mellin, is that Mr. Graffnecker handed you something and said that this is on the Costello case? A. That's right. He said these were the conversations taken from the Costello case, on the Costello matter.
Q. But I ask you again, you do not know of your own knowledge that it was a conversation of Frank Costello; is that correct? A. The conversation was taken over the Costello wire. That is all I can tell you, and that is what he told me.
Q. You are relying on what he told you? A. That's right.
Q. And that applies for those transcripts that he showed you in '37? A. All the time, every time I went over there.
Q. In 1938? A. Yes.
Q. Right through to 1949? A. 1948.

Mr. Christy: Your Honor, as it is one o'clock—
The Court: So it is. We will recess until 2:15.

(Recess until 2:15 p.m.)

Colloquy

[113] AFTERNOON SESSION

WILLIAM J. MELLIN resumed.

Mr. Christy: Your Honor, I have no further questions at this time, but I would make one request.

The witness has referred to a diary which he kept, and in which he listed all of the taps that he has put on in the years 1930 through '49, and I would request the Court to direct the witness to produce the diary for inspection by the Government.

The Court: You have the diary?

The Witness: I have the diary, yes, but I am in an awful predicament here. My wife is in the hospital and I have to stay down here with her, and I live in Poughkeepsie.

The Court: Is there nobody in your home who can bring it?

The Witness: Nobody at all, no. I am living with my son now.

Mr. Christy: Well, your Honor, perhaps we could obtain it during the weekend then. We can work out some arrangement with the witness to obtain it.

The Witness: What I could do, I could have these gentlemen come up to my place during the weekend and I will show them everything I got.

[114] Mr. Christy: I would like to have the diary produced.

The Witness: You can bring it down here.

The Court: If somebody goes up to your place you will be there?

The Witness: I will be up the weekend.

The Court: And you will make it available to them and let them take it back?

The Witness: I sure will.

The Court: Is that agreeable to you?

Mr. Christy: That is agreeable, your Honor.

The Court: All right.

Mr. Williams: I have a few additional questions, if the Court please.

Redirect examination by Mr. Williams:

Q. Mr. Mellin, his Honor asked you during the morning whether or not you were ever told whether you were tapping the wire of a friend or an enemy of Mr. Costello and you said yes; is that right? A. That's right.

Q. The fact of the matter is that when you tapped wires at the instance of your superior you were always told as a method of standard procedure what case you were tapping and whose wire it was; isn't that so? [115] That's right, that's right.

Q. Because you had to put the wire on surreptitiously, didn't you? A. That's right.

Q. You had to avoid being detected by the person whose line you were tapping, didn't you? A. That's right.

Q. And so, when you went to New Orleans, you were told, were you not, by Mr. Burford, whose line you were tapping? A. That's right.

Q. And you were told you were tapping Costello and Kastel in the Roosevelt Hotel; isn't that so?

Mr. Christy: Now just a minute.

The Court: Sustained. Mr. Williams, I was waiting for that objection. You may ask questions but if you wish to testify you will have to take the stand.

Mr. Williams: Your Honor, I have to claim surprise on the cross-examination and therefore I would like the right to cross-examine this witness.

The Court: Cross-examination of your witness?

Mr. Williams: Cross-examination by Mr.—

The Court: Now, Mr. Williams, you understand what I am ruling and you may elicit every bit of [116] information you think appropriate here, but I suggest that you do it in the appropriate way and ask the witness, who has given every indication that he is fully competent to answer questions.

By Mr. Williams:

Q. Well, is it or is it not the fact, Mr. Mellin, that you knew when you tapped the lines in New Orleans whose lines you were tapping? A. Yes.

Q. Is it—

The Court: Pardon me. Whose line was it that you tapped?

The Witness: Yes.

The Court: Who? I say, tell us who it was.

The Witness: Well—

The Court: I had understood you to say that you did not know whose line it was you were tapping.

The Witness: Oh, no, no. I knew whose wires I was tapping.

The Court: All right. Well, with respect—

The Witness: The name Shushan on one and the other one I did not know, but the one in the Roosevelt Hotel I knew that was Kastel and Costello.

The Court: All right.

[117] Q. When you came to New York, as I understand, you put a tap in on Schlime? A. Yes.

Q. Did you or did you not know in what case that tap was for. A. Yes, the Costello case.

William J. Mellin—for Defendant—Redirect

Q. Were you or were you not told that Schlime was a friend of Kastel? A. As I understand, he was supposed to be related to Kastel.

The Court: Were you told? Will you tell us whether or not you were told?

A. I was told that Schlime was a relative to Phil Kastel.

By The Court:

Q. Who told you that? A. Keys.
Q. Your superior? A. Right.

By Mr. Williams:

Q. Did you or did you not know in 1937 that Geigerman, whose name you mentioned, was a brother-in-law of Costello? A. Yes.

[118] Q. His name was Dudley Geigerman? A. Yes, sir.

Q. Is it or is not the fact that Geigerman was ultimately a defendant in the case in New Orleans? A. Yes.

Q. Along with Kastel and Costello? A. Yes, sir.

Q. Mr. Christy on cross examination interrogated you concerning your relation with Mr. Graffnecker in the District Attorney's Office? A. Right.

Q. He asked you whether or not the transcripts which you looked at were transcripts of telephone conversations of Mr. Costello? A. Yes.

Q. Would you tell us in what form those transcripts appeared as you saw them? A. As far as I can remember, they had a number on top, and then the questions went in and out.

Q. Do you know what I mean by dialogue? A. Yes.

Q. Were these transcripts in dialogue form? A. I would say they were.

William J. Mellin—for Defendant—Redirect

Q. Was Costello one of the participants in the [119] dialogue? A. Yes.

Q. Is that true of the transcriptions that you looked at over the years that you have been interrogated about on cross examination? A. Yes, sir.

Q. Is that true? A. Yes, sir.

Q. Where these transcriptions on pads like this? A. Some were on white pads and some were on yellow pads.

Q. These were available to you whenever you went to Graffnecker's office? A. That's right.

Q. And this was a regular course of procedure for you in your investigation? A. That's right.

Mr. Williams: I would like to make a proffer which I think is most necessary for the record. I don't want to contravene what I understand to be your Honor's ruling in the matter, but I do think this proffer is most necessary and I would like to say to your Honor why I think it is relevant without stepping [120] into the teeth of your Honor's ruling.

Our position is that the evidence which I seek to elicit now from this witness is highly relevant because it indicates why a tap was not put on the Costello line in New York City in this tax investigation, although it was the regular course and pattern of conduct in tax investigations from 1937 on to use wire taps in New York in cases of this kind.

I would proffer through this witness, if the Court please, that as an Internal Revenue agent he placed 10,000 taps in income tax cases. I think it becomes very relevant, if the Court please, as indicative of the modus operandi at this time of the Bureau and as explanatory why there was not a direct tap on the home of this particular defendant.

May I ask that question, your Honor?

The Court: You want him to testify he made that many taps; is that what you want?

Mr. Williams: I want to ask him the question.

The Court: How many taps he made?

Mr. Williams: Approximately how many he made as an Internal Revenue agent from 1937 on.

The Court: All right.

[121] Mr. Christy: From 1937 on?

Mr. Williams: From—

By Mr. Williams:

Q. When did you become an agent? A. 1934.

Mr. Williams: 1934.

Mr. Christy: It seems to me it is completely irrelevant.

The Court: From 1937 on, you may ask him.

Q. How many wire taps, approximately, did you use as an Internal Revenue agent?

The Court: I thought you said how many did he make.

Mr. Williams: I will modify the question.

Q. —did you actually place, you yourself as a technical man, for the Bureau of Internal Revenue after 1937? A. Did I place taps after 1934?

The Court: After 1937.

A. Yes.

The Court: Beginning in 1937 and up until the time you left; I assume that is your question, Mr.

Williams, up to the time he left at the end [122] of 1948.

Mr. Williams: Yes.

A. There are two I definitely know about.

Q. I am asking you about all taps that you placed.

The Court: The total of all the taps you made from 1937 up until January, 1949, whether they related to this defendant or anybody else.

That is the question, isn't it?

Mr. Williams: Yes.

The Court: Very well. You tell us how many, approximately, of course.

A. I know I placed about 10,000 taps while I was in the Intelligence Unit, possibly 10,000 taps all over the country.

Mr. Christy: Would he be restricted to answering the question as put to him.

The Court: I have been having a bad success at that since we started this morning. The witness is asked one question and he answers whatever he pleases.

The Witness: It is hard for me to answer that.

The Court: It is hard for me to evaluate [123] too.

The Witness: You see, I never listened in on the taps.

The Court: We don't need anything other than your estimate of the number of taps that you made from 1937 until 1949. You have gone a little beyond that and included 1934 and come up with a figure of 10,000.

The Witness: Right.

The Court: Are you satisfied with that, Mr. Williams, or would you prefer to have it broken down as Mr. Christy would from 1937 to 1949?

Mr. Williams: If the witness can do it I am perfectly willing that he do.

The Court: Are you able to break that down and tell us how many of the 10,000 were from 1937 to 1949?

The Witness: Not only on the Costello case?

The Court: On any case that you say you did it while you were working as an employee of the Government.

The Witness: From 1937 on. A couple hundred.

[124] Q. A couple of hundred from '37 to '49? A. Yes.

Mr. Williams: I have to claim surprise, your Honor, and I would ask for the right to cross-examine the witness.

The Court: You may do so.

Q. Now, Mr. Mellin, you said that you put 10,000 taps on in tax cases, income tax cases, between '34 and '49; is that right? A. Yes, between '34 and '49, '48.

Q. You had an automobile that was given to you by the Bureau of Internal Revenue? A. Right.

Q. That automobile had electronic equipment for the purpose of tapping, did it not? A. Right.

Q. As a matter of fact, that automobile that you had, you carried around resistors and condensers? A. Yes, sir.

Q. You carried around 1,000 feet of three kinds of wire, didn't you? A. Right.

Q. You carried—

Mr. Christy: Your Honor, I object to all [125] this. It is completely irrelevant.

Mr. Williams: I won't be.

The Court: It is preliminary to something. I will allow it.

Q. You carried around headsets and switchboard cords, didn't you? A. Yes.

Q. You carried around all the equipment--

The Court: Mr. Williams, you will please stop this line of questioning. I warned you this morning that this was not a grand inquiry into the conduct of the Government's investigation.

Mr. Williams: I understand that.

The Court: You asked the witness a question which he answered unresponsively by giving us the total of taps from '37 to the beginning of '49. He said 10,000.

You then asked if he would please tell us how many he did from '37 to '49 and he said a couple of hundred. As to that you claim surprise?

Mr. Williams: I am surprised.

The Court: You may now question him about what taps he made but the equipment he carried and all this other business I think is not necessary to elicit [126] the number of taps.

You see, Mr. Williams, I am trying to pay attention to this as it goes along, and I have in mind what the issue is on this hearing. I am really not going to be stampeded by this performance at all, so please get down to the number of taps.

You told us 200 taps from 1937 to 1949?

The Witness: About 200 taps. That is including dictographs and taps together.

The Court: All right. Now go ahead and find out what you want to do about that, but let us forget about all this equipment in the car. I take it that

that is all recorded in an article of which the witness is an author, that was published in some publication.

Mr. Williams: Yes, sir.

The Court: It was referred to today.

Mr. Williams: Yes sir.

The Court: We need not have it here.

Q. Is it your testimony, Mr. Mellin, that approximately 9,800 of those 10,000 taps were put in in a three-year period from '34 to '37? A. Yes.

Q. So that you were putting in an average of [127] 3,000 taps a year in those three years? A. Yes.

Q. You were putting in and installing over ten taps a day, were you, in that time? A. Yes. I installed—

The Court: That is enough. The answer is yes.

Q. And that during the remainder of the time you put in only 200 taps from '37 on? A. About 200, yes.

The Court: Any further questtions of this witness?

Are you finished, Mr. Williams?

Mr. Williams: Yes, I am, your Honor.

The Court: Very well.

Recross-examination by Mr. Christy:

Q. You say you put in 200 taps after 1937, Mr. Mellin? A. I ~~think that~~'s about it, 200 taps.

Q. In other words, when you wrote in 1949 for the Saturday Evening Post that you did not put in any taps after 1937, you were wrong? A. Well, that is a very hard question for me to answer, the way you want me to answer it. I will tell [128] you why if you want me to.

The Court: The question is was it right or wrong when you wrote that.

The Witness: What I wrote in there is right and what I am about to tell you is right.

The Court: Well, the answer is then that when you said that in this article you were not wrong.

The Witness: I wasn't wrong, no.

The Court: That is the answer to that question. Let us move along to the next question.

The Witness: You know, I didn't only do work—

The Court: Just a moment, please. You just wait until you get the question and then try to answer it responsively.

Q. This morning, Mr. Mellin, I asked you about the taps in New Orleans. You told me you put in one on a Mr. Shushan, one on Canal Street and one in the Roosevelt Hotel. A. That's right, two on Canal Street, Shushan and the Roosevelt.

Q. And you did not recall whose phone you tapped in the Roosevelt Hotel? A. I don't recall the room number or the name [129] that the room number was registered to but I do know that Kastel and Costello were in that hotel, and that is the wire I went in on.

Q. What were your instructions? A. Exactly what I just said.

Q. To tap whose line? A. The room in which Kastel and Costelio—the room number—the room that they used, and Burford gave me the room number that was used by Costello and Phil Kastel.

Q. All he told you, as a matter of fact, is, "Go up and put a tap on a room in the Roosevelt," right? A. Right, and the order read Phil Kastel and Costello.

Q. In connection with that investigation? A. That's right.

William J. Mellin—for Defendant—Recross

Q. So you were not actually putting a tap on Frank Costello's telephone? A. I was putting a tap on the room that they used.

Q. Mr. Mellin, I asked you this morning whether or not those sheets that Graffnecker showed you had any telephone number at the top. A. Yes.

Q. And I believe the Court asked you once, and [130] on both occasions you said there were no numbers at the top to identify these sheets. A. This is twenty years ago. All I can remember is that some of those sheets—

The Court: The point is you did not remember it this morning but you do this afternoon?

The Witness: I do this afternoon.

The Court: All right.

Q. Your recollection has been refreshed since this morning? A. That's right.

Q. What were the numbers on there; do you recall that? A. I don't remember that.

Q. There were some numbers? A. I believe it was an Endicott exchange or—Endicott or Susquehanna, something like that, or Trafalgar, I think it was.

The Court: When you say there was a number on these sheets, you mean it was a telephone number and not a file number or something like that?

The Witness: No, a telephone number.

Q. And on all the sheets that you saw in this period from '37 to '49, was the same telephone number [131] on every one of those sheets? A. I believe they were the same number. Now I am not quite sure about that because after all that is twenty years ago and how am I going to remember a number and an exchange?

The Court: The point is you don't remember whether it was the same or a different number.

Q. Your best recollection is that it was the same number on all of these sheets? A. Yes, sir, I'd say that, yes.

Q. And that is through the years '37 to '49? A. '48.

Q. Through '48? A. Yes.

Q. Is that correct? A. Yes.

Mr. Christy: No further questions, your honor.

The Court: Any further questions, Mr. Williams?

Mr. Williams: No.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Williams: Mr. James Ronayne, please.

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[132] James A. Ronayne, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Will you give your present address, lease, for the record, Mr. Ronayne. A. 130 Meadowbrook Road, Garden City.

Q. How long have you lived there? A. Nine years.

Q. How long have you lived in the Metropolitan New York Area? A. All my life.

Q. And what is your occupation at the present time? A. I am an attorney.

Q. I am sorry? A. I am an attorney.

Q. How long have you been a member of the bar? A. Fourteen years.

Q. Directing your attention, Mr. Ronayne, to a period beginning in 1935, how were you employed? A. I was

employed as a special agent in the Intelligence Unit of the Bureau of Internal Revenue.

Q. How long were you employed in that capacity? A. For about ten years, from 1935 to 1945.

[133] Q. And was that always in the New York area? A. It was.

Q. Mr. Ronayne, did you testify as a witness for the Government in a tax case in which the defendant here, Frank Costello, was the defendant in the federal court in New Orleans in 1940? A. Yes, sir.

Q. Did you likewise testify as a witness for the Government in a tax case in which the defendant, Frank Costello here, was a defendant, here in New York in 1954? A. I did.

Q. That was the case that was tried before Judge McGohey; is that right? A. That's right.

Q. In each of those cases did you identify a statement that you had taken from the defendant Costello on October 18, 1937? A. I did.

Mr. Williams: May we have this marked for identification, please.

(Marked Defendant's Exhibit A for identification.)

[134] Mr. Christy: I object on the ground it is incompetent, irrelevant and immaterial.

The Court: It hasn't been offered.

Mr. Christy: I thought he had offered it.

Mr. Williams: Not yet.

Mr. Christy: I am sorry.

By Mr. Williams:

Q. I hand you, Mr. Ronayne, an exhibit marked Defendant's Exhibit A for identification and ask you if that is a copy of the statement which you took from the defendant Costello on October 18, 1937 (handing to witness)? A. It appears to be a copy, yes, sir.

James A. Ronayne—for Defendant—Direct

Mr. Williams: I have to offer a copy, your Honor, because the original is in the possession of the Government, I assume.

The Court: Have you asked for it prior to now?

Mr. Williams: No, I haven't asked for it. But if there is any question, I shall ask for it now.

Mr. Christy: I have not had a chance to check it, your Honor. I will object to it as irrelevant and immaterial.

The Court: Sustained. You may offer it [135] later on. I don't know for what purpose you are putting that statement in, how that is going to prove any issue here. It is purported to be a statement taken of the defendant.

Mr. Christy: Yes, part was offered on the trial.

The Court: This is the full statement.

Mr. Williams: This is the opening net worth figure.

The Court: Your point is that this is the whole statement that was taken?

Mr. Williams: Yes, sir. The record of the trial has in it the portion that was actually offered and received at the trial. I will be glad to stand on the record of the trial if Mr. Christy makes a point of this.

The Court: Anything that is in the record of the trial is something I must take notice of. You can do what you want about it. Anything that was introduced at the trial of course is pertinent here.

I take it that the basis of Mr. Christy's objection is that there may be other matter in there which he considers irrelevant at this point.

Is that your point?

[136] Mr. Christy: Part of it. Also, I think the introduction of this statement, or any portion of it, at this time is irrelevant and immaterial.

The Court: What difference does it make? It is already a part of the record and I must notice anything in the record.

Mr. Christy: Limited to that part which actually went into evidence.

Mr. Williams: I am glad to abide by that. It is Exhibit 23 of the Government in the record.

The Court: That is the part you want to direct my attention to anyway.

By Mr. Williams:

Q. Preliminarily to taking the statement to which we have just alluded, Mr. Ronayne, did you receive from your superior in New York an order to participate in the investigation of Costello's income tax returns? A. Yes, I did.

Q. That investigation was being conducted both in New Orleans and in New York; is that correct? A. It was being conducted in New Orleans. I was asked to assist them.

The Court: Who was the superior who gave you that instruction?

[137] The Witness: Mr. Hugh McQuillan, special agent in charge.

The Court: Very well.

By Mr. Williams:

Q. When McQuillan directed you to proceed with the investigation in New York, did he give you certain background information? A. He did.

Q. Was this background information on the tax investigation which ultimately resulted in the trial in which you testified in New Orleans? A. It related to Costello's affairs, yes.

Q. Costello's income taxes? A. Yes, it did.

Q. Did you or did you not learn whether wire taps had been used from your superior to get this information?

Mr. Christy: I object to it as leading, your Honor.

The Court: It is leading. I am going to sustain it, Mr. Williams, because I think that you can really do this without leading.

Mr. Williams: I will rephrase the question.

[138] The Court: Here is a man with all his experience and a member of the bar. I don't think you should have any difficulty in obtaining answers without leading the witness.

Mr. Williams: I will reframe the question.

By Mr. Williams:

Q. What did you learn from Mr. McQuillan or from your superiors relating to this case as to the source of information with which you were provided? A. Mr. McQuillan was my superior and at the time he assigned the case to me he had told me that wires had been installed in New Orleans in connection with this case, and I should read over the request for information from New Orleans and consult Mr. Mellin, who had been down in New Orleans to put in the wires, that he may be of some assistance to me in connection with my investigation here.

Q. Was Mellin, in so far as you know, the only agent in New York who had participated in this New Orleans investigation? A. That is all Mr. McQuillan told me.

Q. Did Mellin work with you in 1937, prior to October, when you took this statement? [139] A. I don't understand what you mean by worked with me. He was a special agent in the Intelligence Unit at that time.

Q. Did he work with you in the Costello investigation? A. I asked for his assistance, yes.

The Court: I understood your question to be had he and Mellin worked together before this.

Mr. Williams: In this investigation before he took the statement from Costello.

The Court: I see.

By Mr. Williams:

Q. Did you use any source—

By the Court:

Q. You told us that Mr. McQuillan told you about Mellin's activities in New Orleans? A. Yes.

Q. And suggested you confer with Mellin? A. Right.

Q. Did you confer with him? A. I did.

The Court: Go ahead.

By Mr. Williams:

Q. Did you during your investigation have [140] any contact with the District Attorney's Office? A. Yes, I did.

The Court: You mean the District Attorney of New York County?

Mr. Williams: Yes. A. Yes, I did.

Mr. Christy: This is 1937?

Mr. Williams: 1937, yes.

By Mr. Williams:

Q. Did you have any contact with Captain Grafenecker in that office? A. I don't know if he was a captain at that time, but a William Grafenecker, as I recall the name, who was assigned to the District Attorney's Office.

The Court: A police officer?

The Witness: From the Police Department of the City of New York.

Q. Was information made available to you from Grafenecker's files? A. I discussed the case with him and asked him what information he could assist me on in connection with my investigation.

Q. Were you supplied information by him?

[141] *By the Court*:

Q. You made that request of Grafenecker? A. I did.

Q. Did he respond to it in any way? A. He cooperated with me and offered to assist me.

Q. He did respond? A. Yes.

Q. Did he tell you he might have information that might be helpful to you? A. He told me information. Whether it was helpful to me or not I do not recall.

Q. Did he tell you he had information? A. Yes.

Q. Did he give you information? A. Yes, he did.

Q. What form was it in? Was it oral or written? A. Oral.

Q. Where did this occur and when? In 1937? A. Yes.

Q. Where? A. In his office.

The Court: Go ahead.

[142] *By Mr. Williams*:

Q. Did Mellin secure information at your request from Grafenecker in this case at that time? A. As I recall, Mellin introduced me to Grafenecker.

Q. My question is specifically, did he secure information from Grafenecker at this time in this case for you? A. I don't recall.

James A. Ronayne—for Defendant—Direct

Q. You don't recall his getting information directly for you? A. I don't.

Q. Were you apprised by Mellin or Grafenecker of the source material of the information given you? A. Yes.

The Court: What information? He says he doesn't know if Mellin gave him any information.

Mr. Williams: Information given him by Grafenecker.

(Question read.)

By the Court:

Q. You say you got certain information from Grafenecker in oral conversations? A. Yes.

[143] Q. In those conversations did you learn what the source of the information was that he was passing on to you? A. Yes.

Q. Did you learn it from him? A. Yes.

Q. What did he tell you? A. He said they had Costello's home wires tapped.

Q. When he gave you information, did you make notes of it? A. I don't recall, your Honor. I rendered a report, but what was in the report is all I can recall.

Q. How many times did you see Grafenecker in this period? A. A couple of times.

Q. Only a couple of times? A. That's all.

Q. You got information from him, but you don't recall whether you wrote it down on a piece of note paper or a book or anything like that? A. I feel I didn't write it down.

Q. You think you did not write it down? A. That's right.

Q. Very well. Were there occasions when you [144] got information from Grafenecker without a personal interview between you and him; did you get it from him on the telephone? A. No.

Q. Did you get it in any other form of communication? A. Not that I can recall.

Q. Was there any occasion when anybody went to Grafenecker and then came back and reported to you that he had seen Grafenecker and had gotten certain information? A. Not to my recollection.

The Court: Very well.

By Mr. Williams:

Q. Did Mellin ever do that? A. Not to my recollection.

Q. Was there any time, Mr. Bonayne, when you had wire taps installed for the purpose of getting Costello conversations? A. I can recall an incident when we tapped the wire of an apartment on Fifth Avenue, when Mr. Mellin tapped the wire, but I don't recall the extent of the conversation learned or what, if anything, was obtained.

[145] *By the Court*:

Q. Can you tell us when that occurred? A. I can only approximate it some time around 1937 or 1938.

Q. 1937 or 1938? Do you know whether it was in the winter, summer, spring, fall? A. I can't recall.

By Mr. Williams:

Q. Was that tap which you just described to his Honor placed by Mellin at your request to get Costello conversations? A. Yes, it was.

Q. And that was placed at an apartment on Fifth Avenue? A. That's right.

Q. Do you recall who monitored the line? A. No, I don't.

Q. Was there any other time when a tap was placed on anyone for the purpose of getting Costello conversations

by the Bureau of Internal Revenue, to your knowledge? A. Yes, I placed, I had placed a tap at a later date on an employee of the Internal Revenue Service by the name of Schoenbaum in some apartment house around the 50s.

[146] Q. Who placed that tap? A. Mr. Mellin. I recall going to the basement of that apartment with him.

Q. Was that a tap placed at your suggestion? A. Yes, it was.

Q. Were you under orders from any superior on that? A. No, that was on my own discretion.

Q. Was it placed because you expected to get Costello conversations over this line? A. It was placed in connection with an official investigation as to whether or not Costello and Schoenbaum were consorting together.

Q. Did Mellin place any other taps at your request in this case? A. No, sir.

Q. Do you recall an instance when you, in connection with the investigation of this case, got information from a police officer in Stamford, Connecticut?

> Mr. Christy: Which case?
>
> Mr. Williams: The Costello case.
>
> Mr. Christy: Which one?
>
> Mr. Williams: This is the New York case I am now talking about. [147] A. No, I received no information on the 1954 case. I never worked on that case.

Q. Did you ever go with Mellin to Stamford, Connecticut, to discuss Kastel? A. Yes, I did.

Q. Was that in connection with the New Orleans case or this case, the New York case? A. With the New Orleans case.

Q. Did you get information there from that detective in Stamford?

James A. Ronayne—for Defendant—Cross

Mr. Christy: I object to that, your Honor.
The Court: Sustained.

Q. Did you get wire tap information?

Mr. Williams: I will rephrase the question, if the Court please. I think I understand your ruling.
The Court: All right.

Q. On that instant. A. I lost the question.

The Court: Did you get wire tap information from this police officer in Connecticut?

A. This police officer, he told me he had a tap on Kastel's wires up there. The extent of the information given to me I don't recall at this time.

[148] Mr. Williams: I have no further questions.

Cross-examination by Mr. Christy:

Q. During the time you were in the Intelligence Division of the Treasury Department, do I understand you did no work in any way on the 1954 income tax evasion case of Costello? A. If I understood your question, you said while I was in the Government service. I left the Government service in 1945. I had nothing to do while in the Government service in connection with the 1954 tax case of Costello except that I was called as a witness in that case.

Q. That was the extent of your participation in that case? A. Yes, sir.

Q. When you went to New Orleans, you were instructed to talk to Mr. Mellin? A. No, sir.

Q. Weren't you given the name of Mr. Mellin and told he might provide you with information? A. Mr. Mellin was a New York agent. I consulted Mr. Mellin in New York. I didn't consult Mr. Mellin in New Orleans.

James A. Ronayne—for Defendant—Cross

[149] Q. You talked to him, did you not? A. Yes.

Q. It was in reference to certain taps which had been put in by Mr. Mellin in New Orleans? A. That's right.

Q. Did you ever get any information from Mr. Mellin which he had gotten from these taps which you subsequently used? A. Not to my knowledge.

Q. I think you testified that you spoke to Mr. Grafenecker of the New York County District Attorney's Office on several occasions. A. On several occasions, yes.

Q. Do you recall approximately when that was? A. The best recollection is 1937 or 1938.

Q. And I believe you testified that you did not make any notes, to the best of your recollection of what you learned from Grafenecker? A. That's right

Q. You did not use, did you, in connection with the 1939 case against Costello, any of that information that you learned from Grafenecker? A. I can't say that. I don't know what information I got and I can't recall if I used any [150] information.

Q. But you cannot recall now ever using any of that information? A. I can't recall it, no, sir.

Q. Do you recall when this tap on the apartment on Fifth Avenue was put in? A. 1937, 1938, around that time.

Q. Do you know for a fact that a tap was put in? A. I didn't actually see the tap, but I understand one was put in.

Q. Did you ever get any information that stemmed from that tap? A. Not that I can recall.

Q. So, therefore—

The Court: Did you ever get any documents or papers that purported to be a recording of conversations from that wire that was tapped on Fifth Avenue?

The Witness: No, sir, not to my recollection.

The Court: You don't recall?

James A. Ronayne—for Defendant—Redirect

The Witness: I feel that I didn't get any, your Honor.

The Court: Very well.

[151] Q. Your best recollection is that you didn't get any information? A. That's right.

Q. So, therefore, you could not have used any information in the 1939 trial? A. My best information, I didn't get any documents relative to the wire taps. Whether I got information or not I can't recall.

Q. You can't recall getting any information from the tap? A. I can't.

Q. You never asked Mr. Grafenecker to put in a tap for you, did you? A. No, sir.

Q. You didn't ask anybody in the New York County District Attorney's Office to put in any tap for you at any time, did you? A. No, sir.

Q. You never sat on a state tap, did you? A. No, sir.

Q. By that I mean actually monitored a conversation? A. No, sir.

Mr. Christy: No further questions, your [152] Honor.

Redirect examination by Mr. Williams:

Q. Mr. Ronayne, on cross examination Mr. Christy asked you whether you got any information from Mr. Mellin which you knew came from the taps that he installed in New Orleans preparatory to taking your statement of October 18, 1937. I understood you answered no; is that correct? A. I don't recall getting any information.

Q. You did get background information from the chief in New Orleans preparatory to taking your statement; is that correct? A. I got a letter from the New Orleans office outlining certain information and asking me to inquire of

Costello and fill them in with these facts that they requested.

Q. You got background information when you came into the case and that background information came from New Orleans? A. It did.

Q. From the Bureau of Internal Revenue office there? A. Yes.

Q. That was the information which you learned [153] from your superior had its origin in the taps that Mellin put in?

Mr. Christy: I am going to object to that question. It seems to me Mr. Williams is testifying.

By the Court:

Q. You got information from somebody when you went to New Orleans? A. No, I got a letter from New Orleans assigned to me with the information.

Q. Did you talk to anybody when you went to New Orleans—you didn't go to New Orleans? A. Not until several years later, to testify.

Q. By the time you got into this investigation, whatever information you got was contained in this letter; is that correct? A. Yes.

[154] The Court: Did the letter state the sources of the information?

The Witness: I don't recall what was in the letter.

The Court: Very good. Very well.

By Mr. Williams:

Q. Did you learn the sources of information from those agents in charge of the New Orleans case at a subsequent date?

James A. Ronayne—for Defendant—Redirect

The Court: You had better rephrase that a little bit.

Q. Did there come a time when you learned of the source of the information with which you were provided when you got into this case in 1937? A. No, nobody told me specifically that certain things came from wire tapping.

Q. Did you have a conversation—was there an agent named Burford in New Orleans in charge of this case? A. He was the agent in charge of the New Orleans division, the Intelligence Unit.

Q. I understood you to say that Mr. Burford had a conversation with you on this matter; is that correct? A. I didn't testify here today to that.

Q. Was it Mr. McQuillan? A. Mr. McQuillan.

[155] Q. And Mr. McQuillan told you that the information had its origin in wire tapping? A. No. Mr. McQuillan told me that Mr. Mellin had gone down there and installed some wire taps and I should consult with Mellin; he may be of some assistance to me.

Q. This is when you first got into the case? A. That's right.

Q. Was this after you got your background information from New Orleans or before? A. At the time of the assignment of the case, Mr. McQuillan told me of the wire taps and handed me the letter of request from New Orleans and said, "See what you can do to help them get the information."

Q. That was the full letter of information on the Bayou Novelty Company, was it?

The Court: Pardon me. I didn't hear that.

Q. That was a letter containing information on the Bayou Novelty Company and Costello and Kastel and Geigerman? A. That was the name of the partnership in which they were interested down there.

Q. Was that partnership involved in the case that was ultimately tried in New Orleans? [156] A. Well, the partnership had no tax liability.

Q. I understand. A. It was the income from that partnership that was involved, the personal liability of the individuals before the court.

Q. But the information which you received in 1937 from New Orleans related to this Bayou Novelty Company and the relationship to it of Costello, Kastel and Geigerman; is that right? A. Yes, it did.

Mr. Williams: That is all I have, your Honor.
Mr. Christy: No further questions, your Honor.
The Court: Very well. You may step down.
(Witness excused.)
Mr. Williams: I call Mr. Bolich, please.

DANIEL A. BOLICH, called as a witness by the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Would you state your place of residence, Mr. Bolich. A. 209 Morris Avenue, Spring Lake, New Jersey.

[157] Q. How long have you lived there, sir? A. For the last ten years.

Q. Was there a time, Mr. Bolich, when you were an employee of the United States Treasury Department? A. Yes, sir.

Q. In what year did that employment begin? A. 1922.

Q. And for how long did it continue? A. Until 1951.

Q. Over a period of 29 years? A. Right.

Q. Was there a time during that period of employment when you were the special agent in charge of the New York office? A. There was.

Q. And in what year did that begin? A. February 1946.

Q. And for how long did that continue? A. Until September 1948.

Q. During that period, 1946, 1947, 1948, when you were special agent in charge of the New York office, was the Costello tax case under investigation? A. It was.

Q. Who was your immediate deputy at that time?

[158] The Court: Pardon me, Mr. Williams. When you say the Costello tax case, I take it that now you are referring to the case that was tried in 1954.

Mr. Williams: That is right.

The Court: Very well.

Mr. Williams: I will repeat the question, Mr. Bolich.

Q. During this period, 1946, '47 and '48, when you were a special agent in charge of New York, was the Costello tax investigation, which ultimately culminated in a trial in '54, was it under active supervision by you? A. Yes.

Q. And who was your immediate deputy in that time? A. Mr. Walter Murphy, who was the assistant special agent in charge.

Q. And what agent was specifically assigned to the Costello case? A. Special Agent Cordes.

Q. As agent in charge, did you maintain a familiarity with the conduct of this investigation? A. To a degree, yes.

Q. Did Murphy maintain a familiarity, to your [159] knowledge, with this investigation? A. Yes, he was more actively concerned with the investigaton than I would be.

Q. Was the investigation intensive during the years when you were chief in New York or was it just a routine investigation? A. No, it was under intensive and active investigation during that entire period.

Daniel A. Bolich—for Defendant—Direct

Q. In 1948, when you left, what office did you take? A. On September 1st I became assistant commissioner of Internal Revenue.

Q. Were you familiar while you were agent-in-charge; with the modus operandi of the investigation being conducted in the Costello case? A. Yes.

Q. Would you tell us what you recall about it. A. You mean what constitutes an intensive investigation?

Q. What an intensive investigation in the Costello case was.

The Court: Is it necessary, Mr. Williams, in view of the thrust of your motion to go into anything other that the particular kind of investigation?

[160] Mr. Williams: I did not want to have an objection that I was leading.

The Court: Well, you do not have a jury here, and it is a little late in the day to be worried about leading because it has been going on since we started, so it will help, I think, to cut down a bit and get right to it.

Mr. Williams: All right.

Q. Would you tell us whether you were familiar—and I think this will be very short—with what Cordes was doing during his investigation with respect to liaison with other agencies of the Government. A. He was conducting an active, intensive investigation of Costello's financial affairs and transactions, and he was establishing contact and liaison with all other investigative agencies of the Federal Government and the State of New York from which he could get any assistance or any information.

Q. What specifically in the way of other agencies was he contacting? A. Well, it was the Narcotic Bureau of the Federal Government, the Alcohol Tax Unit of the Federal Government, the State Liquor Authority, which was New

York State; the Police Department, New York City, and [161] the District Attorney's office, New York County. There may be some other agencies involved that escape me for the moment.

Q. Were you familiar with what Cordes was doing in relationship to the District Attorney's office? Did you get familiarity as chief with what— A. With Mr. Hogan's office, you mean?

Q. Yes. A. I understood that Mr. Cordes had established contact with Mr. Hogan's office, and was getting a degree of cooperation from Mr. Hogan's office; that certain information that they had was being made available to him.

Q. Did you know the nature of that information or do you know? A. Part of it was the record of wire taps that had been maintained on Mr. Costello by Mr. Hogan's office for a period of years.

Mr. Christy: May we have a time on this, your Honor?

The Court: Yes. The witness says that this was occurring between the years 1946, '47 and '48, up until September 9th.

Mr. Christy: Very well.

[162] Mr. Williams: Yes, sir.

Q. Now do you know who was in charge in Mr. Hogan's office of the wire taps that you mentioned? A. There was a Mr. Grafenecker and a Mr. Canavan, that I think we had contact with.

Q. Was William Mellin an agent in your office during '46, '47, and '48? A. Mr. Mellin was in our office and he was a member of Mr. Cordes' group.

Q. Had he been specially assigned to Cordes' group? A. Yes.

Q. In what year was Mellin assigned to Cordes? A. I would say about 1946. It was after I came there, which would be after February 1st, '46.

Daniel A. Bolich—for Defendant—Cross

Q. Was Mellin still in the New York office at the time you terminated in New York? A. Yes, that would be in September '48 he was still in the New York office.

Q. Was he still assigned to Cordes? A. He was.

Q. In the Costello case? A. Cordes was in charge of the Costello case, and he had a number of men assigned to him. Mellin was [163] one of them.

Q. Were there any other agencies of the government providing information to the investigation which we are concerned with here? A. Other than what I mentioned?

Q. Yes. A. That was Narcotics, Alcohol Tax Unit. I don't recall any other federal agencies.

Q. Those were the only ones that you recall? A. Yes.

Q. You say there was no other in so far as— A. I don't recall any other federal agencies.

Mr. Williams: That is all I have.

Cross-examination by Mr. Christy:

Q. Mr. Bolich, from 1946 until you left in '48 you were the special agent in charge? A. That's right.

Q. And you were therefore in a supervisory capacity in that office? A. That's right.

Q. Whitman Cordes was one of the agents assigned to the case? A. That's right.

Q. You do not have any personal knowledge of [164] what Cordes was doing, do you? A. No, not in detail. I had a general knowledge that he was in charge of the investigations that were assigned to him and that he was conducting them.

Q. That he was conducting an investigation? A. That's right.

Q. But you had no personal knowledge of what, if any, information he may have gotten from the District Attorney's office? A. Other than I understood that the District

Attorney's office was cooperating with him and that these wire taps had been made available to him.

Q. That was your understanding? A. That's right.

Q. But you had no personal knowledge of it? A. None whatever.

Mr. Christy: That is all, your Honor.

The Court: Very well.

(Witness excused.)

The Court: This is probably a good time to take our mid-afternoon recess.

(A short recess.)

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[165] Mr. Christy: Your Honor, before we commence again I wondered if the Court would inquire from Mr. Williams what his plans are on the various witnesses which the Government has produced. We have now gone through most of the day and we have a great many agents and several bureau heads here who have been waiting to testify, and I think they might properly be excused if Mr. Williams doesn't intend to get to them today.

Mr. Williams: I told Mr. Leath I am perfectly willing for them to be excused.

The Court: Who is your next witness?

Mr. Williams: Mr. Grafenecker. I think he will consume the rest of the time, your Honor.

The Court: Very well. All other witnesses are excused. I think Mr. Christy's point is a little narrower than that. He wants to know, for instance, are there any of the Government employees here who will not be needed tomorrow.

Mr. Williams: I will certainly communicate with him after court today, overnight, and tell him what

we will need for tomorrow, so the inconvenience will be minimized.

The Court: That is very nice.

[166] **Mr. Christy: The other witnesses may leave now, then?**

Mr. Williams: Certainly.

Your Honor, may we approach the bench, please?

The Court: Certainly.

(Discussion off the record at the bench.)

WILLIAM J. GRAFENECKER, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you reside, please, Mr. Grafenecker? A. Greenwood Lake, New York.

Q. How long have you resided there? A. For the past four years.

Q. Were you engaged as a police officer for a number of years in New York City? A. I was, for about 29 years.

Q. When did that period of service begin, Mr. Grafenecker? A. 1925 to February 15, 1954.

Q. 1954? A. That's correct.

Q. During that period of time, were you assigned [167] to the District Attorney's Office? A. For some period of that time, yes.

Q. Will you tell us what that period was? A. I was assigned to the Office of the Special Prosecutor in 1936, and then to the District Attorney's Office of New York County from 1938 until 1954.

Q. From 1938 to 1954 to the District Attorney for New York County; is that right? A. Yes.

Q. Prior to that time to the Special Prosecutor's Office? A. That's right

Q. That went back to? A. 1935.

Q. Prior to that time? A. Prior to that time I was with the Bureau of Criminal Information, which was the Detective's Squad, and prior to the Detective Squad I was a uniformed patrolman in the Bronx precinct.

The Court: Did you work in the DA's Office until the time of your retirement in 1954?

The Witness: Yes.

Q. When you were with the District Attorney's Office—and I refer to the District Attorney for New [168] York County—were you head of the investigative unit attached to that office? A. I was in charge of the New York City detectives who were assigned to the District Attorney's Office.

Q. When did you take that role? A. Prior to becoming the commanding officer of the squad I had been a member of the squad as a sergeant and as a lieutenant, and in 1940 I became the commanding officer.

Q. In 1940 you became commanding officer. Prior to that time you had had the role of superior over these men but you were not the commanding officer; is that correct? A. That's correct.

Q. How many men were attached to this squad? A. The figures varied from 60 to sometimes 100.

Q. As head of the police attached to the New York County District Attorney's Office, were you in charge of wire tapping investigations done by that office? A. I was.

Q. And that dates back— A. That was part of my duties.

Q. That dates back, I take it, to 1940 likewise? [169] A. That's correct.

Q. How many technical men did you have assigned to you, and by that I mean men who intercepted telephone communications? A. At one time there were four and later two.

William J. Grafenecker—for Defendant—Direct

Q. You are not a technical man yourself? A. No.

Q. You are not qualified to intercept telephone communications? A. I am not.

Q. During this period, Mr. Grafenecker, do you recall whether or not conversations of the defendant in this case, Frank Costello, were intercepted by your squad? A. Yes, they were.

Q. That was over how long a period of time? A. 1943 up to 1954.

Q. Were there intereceptions prior to that time?

The Court: Prior to 1943?
Mr. Williams: Yes, sir.

A. No. Not on Costello's wire, not on his residence.

Q. Were there interceptions on Costello prior to that time? [170] A. No.

Q. Why did you qualify not on his residence when I asked you? A. I say that because my recollection is there were other wire taps in the '30s but not on his residence.

Q. Were there wire taps that were put in to get his conversations? A. Yes.

Q. Where were they put in? A. My only recollection of one is an attorney by the name of Wolf.

Q. Do you have a recollection of any other interceptions that were put in? A. Not without consulting records.

Q. Would there be records of interceptions that antedated 1942? A. There were.

Q. The New York statute authorizing taps when done pursuant to warrant out of the state court was passed in 1942? A. Yes.

Q. Prior to that time there were no enabling acts permitting the police to intercept telephone [171] conversations; is that correct? A. That's my understanding.

Q. But there were interceptions nonetheless prior to that time by your office? A. There was.

Q. Your recollection is that there were interceptions made designed to get Costello's conversations? A. That's correct.

Q Outside of Wolf's—

The Court: Prior to 1942?

Mr. Williams: Yes, sir.

Q. Outside of Wolf's, you don't recall any others? A. I don't recall any locations.

The Court: When was the Wolf interception?

The Witness: My recollection is that that would be somewhere around 1936 or 1937.

Q. Thereafter you had a consistent pattern of intercepting Costello's conversations from 1943 on; is that correct? A. Yes.

Mr. Christy: I am going to object to any further testimony along these lines on the ground whether or not the District Attorney tapped the phones of Costello is irrelevant at this hearing under the Benanti decision.

[172] The Court: Well, that may be, but I take it this is preliminary to the Mellin testimony. I will allow it.

Objection overruled.

Q. You say these went on during your experience as the captain of this squad; is that right? A. That's right.

Q. Through '54 and, of course, you are not able to tell us what took place thereafter.

Would you tell us what the practice was of your office, Mr. Grafenecker, with respect to these intercepted conversations. Were records kept of them? A. You mean—

William J. Grafenecker—for Defendant—Direct

Q. I don't mean recordings. I mean memoranda. A. Yes.

Q. Or transcripts of them. A. Yes.

Q. And how would these taps be manned; were they manned mechanically or were they manned humanly? A. Manned by detectives.

Q. They were manned by detectives. And were they manned around the clock by different detectives or just during certain periods of the day? A. Certain periods of the day.

[173] Q. So that at night presumably the human monitor would not have to stay on the line; is that correct? A. Some occasions he would and some occasions he wouldn't.

Q. Were the conversations that were intercepted reduced to writing by the detectives who were on the line? A. Yes.

Q. Were they shorthand stenographers? A. No, they were not.

Q. They were speedwriters? A. No.

Q. Did they purport to transcribe the conversation accurately or substantially accurately? A. Substantially.

Q. And in what form would they be recorded, Mr. Grafenecker? A. They would be on yellow pads.

Q. This kind? A. Yes, about that size.

Q. Yellow foolscap pads? A. That's right.

Q. And what would be the regular routine with [174] respect to those pads or these transcriptions at the end of each day? A. My recollection is that they would be made in duplicate and that one copy would go to the assistant in charge of that particular case and the other copy would go in my file.

The Court. Were they transcribed on a typewriter?

The Witness. No, they would be handwritten.

The Court: The detective making the recording, did he use carbon to make the second copy?

The Witness: That's correct.

Q. You say to the assistant in charge of the case. Do you mean the assistant district attorney? A. That's right.

Q. Well, if there were no active case at the moment, Mr. Grafenecker, to whom would the original go? A. To the assistant who was assigned to that particular matter.

Q. And there would always be some assistant in Mr. Hogan's office who was in charge of the matter— A. Designated.

Q. —in which the taps were being used? A. That's correct.

[175] Q. Were any index cards prepared with respect to the taps that were made on the various lines? A. Yes.

Q. Will you explain how that worked. A. There would be an index card of both the subject matter together with the telephone number of the person called and that person's name and address.

Q. So that if a tap were on Mr. X and he called Mr. Y, Mr. Y would automatically become indexed in your file? A. That's correct.

Q. And therefore by going through your files you could pick out all the calls on Mr. Y even though he himself had not been tapped in relationship to his own phone? A. That's right.

Q. Was any other type of record kept with respect to these interceptions? A. Just the plant cards.

Q. The what? A. The plant cards. We call them plant cards. It is a card made by the detective.

Q. Would you explain what you mean, sir, by plant cards. [176] A. The detective would index the phone number and the name of the person calling, make a card out for each person. Thereafter he would index on that card the date and time of the call together with a very brief outline of what the call was about.

In other words, the yellow foolscap would be synopsized, would it, into small cards? A. That's right.

Q. That would be like a—do you understand what I mean—a library card? A. No, it is—oh, I'd say about 4 x 6.

Q. 4 x 6 card. So that on every telephone conversation which had been intercepted there would be a synopsis on a card made for your files? A. That's correct.

Q. Is that right? A. Correct.

Q. And that would correlate to the original transcription itself; if you wanted to read the whole transcription you could read that in your file too? A. That's right. It would be an index to the transcription.

Q. Would this be the index or would this be just a synopsis? [177] A. Well, if you wanted to find a certain message from the card, you would know what date it was on and you could look it up easier.

Q. Did you have a record of every number that was called by the person whose line was intercepted, even after the dial system came in? A. Yes.

Q. That was as a result of a mechanical device you put on the phone? A. That's right.

Q. Do you recall whether or not you had taps on Costello's house when he lived at 241 Central Park West? A. I don't recall that. I would have to see the records.

Q. You don't have an independent recollection of that at this moment? A. No, the address 241.

Q. But you do recall 115 Central Park West, I take it. A. Is that out 72nd Street?

Q. Yes. A. Yes, I do recall.

Q. Did you have other telephones tapped where [178] he was expected to make calls? A. I believe there was one.

The Court: I didn't hear the answer.

The Witness: I believe there was one.

Q. And that was over the same period that you described previously for us, '43 to '54? A. Yes

The Court: Can you specify the time any more closely than that?

The Witness: No, I couldn't, your Honor.

The Court: Pick out any one year?

The Witness: No, I couldn't.

The Court: Very well.

Q. This was a continuing tap, was it, that was in and out, in and out over this whole period of time? A. You mean Mr. Costello's residence?

Q. Yes. A. Yes, that was a continuing tap.

Q. And was the other tap that you alluded to also a continuing tap? A. My recollection of that is that it was a short tap; it wasn't in too long. That is my best recollection.

Q. And that was at a place from which he made phone calls? [179] A. That is true.

Q. Do you remember the address on that one? A. No, I don't.

Q. For how long are the records kept in the District Attorney's office on these wire tap interceptions? A. I believe most of them are kept forever.

Q. Kept forever. In other words, they are not destroyed after a period of time? A. That is my knowledge of them.

Q. What was your policy with respect to making these records available to law enforcement agencies? A. I cooperated with every agency and they cooperated with me.

Q. And when you say you cooperated, you gave them access, if they made a formal request or if an authorized officer from one of these agencies made a request, you gave them access to your interceptions? A. I did.

Q. Did you have such a policy of cooperation with the Bureau of Internal Revenue? A. I did.

Q. And over how long a period of time did that exist? [180] A. Oh, from about 1933, 1934 up until the time I retired.

William J. Grafenecker—for Defendant—Direct

Q. Do you recall with whom you had contact mostly with the Bureau? A. Mr. McQuillan, Mr. Keys, Mr. Mellin, Mr. Cordes, and there were other agents whose names I do not recall.

Q. Those names don't come back to you at this moment? A. No, they don't.

The Court: Was Mr. Ronayne one?
The Witness: Yes, yes.

Q. Do you recall whether or not you ever helped the Bureau install taps? Did you ever help anyone from the Bureau install taps? A. No, I did not.

Q. Did any of your men do that? A. At one time we had two men from the Police Department who were assigned to the Bureau of Internal Revenue, Detectives Crotty and Salke.

Q. Would you spell those for the reporter, please, Mr. Grafenecker. A. Thomas Crotty, C-r-o-t-t-y, and Julius Salke, S-a-l-k-e. They were assigned by Inspector (181) John A. Lyons in the 1930s, and they were there for a number of years with the Bureau.

Q. Do you recall, Mr. Grafenecker, whether you ever assisted the Bureau of Internal Revenue by providing men to man taps of the Bureau? A. Only these two men.

Q. They were there for some time? A. For several years.

Q. Do you recall whether or not Mr. Mellin ever rendered you any assistance? A. Yes.

Q. He did? A. Yes.

Q. Did he aid you in installing taps? A. Did he what?

Q. Did he aid you in installing taps? A. No. Mellin's assistance to me was in the form of information on various subjects.

Q. In other words, you had a mutual exchange of information with him? A. That's correct.

Q. When he wanted information from you you would give it to him and vice versa? A. Correct.

[182] Q. And you allowed him access to your intercepted communications? A. I did.

Q. Do you recall in the Costello case—and I have reference to the Costello tax case under investigation by the Bureau of Internal Revenue—whether information was sought from you? A. Yes, it was.

Q. And that was in what years, as you recall? A. I recall in the 1930s giving them information, whatever information I had available at that time, and then up to the time I retired.

Q. This was a continuous thing, was it? A. Yes.

Q. The agents would come over and Mr. McQuillan would call you and ask you to give his agent information? A. Yes, I would make an appointment and one of his agents would come over.

Q. And he would be given access to his interceptions? A. Yes.

Q. Is that true of Mr. Keys? A. Yes.

[183] Mr. Christy: May we have which case?

Mr. Williams: I will trace it over a period of time.

Q. You say this began back in the 1930s? A. That's right.

By the Court:

Q. Would it begin as early as the time that you were working for the Special Prosecutor? A. Before that.

Q. That would be before 1935? A. That's correct. My best recollection is it would be around the early part of 1934.

Q. When did you first go with the District Attorney? A. Special Prosecutor, 1955.

Q. This occurred before that? A. 1934.

Q. You were not with the District Attorney's Office? A. I was not.

Q. This was in the Police Department and not with respect to the District Attorney? A. Yes.

The Court: All right. Go ahead.

[184] *By Mr. Williams*:

Q. Mr. Mellin at that time was attached to the Bureau of Internal Revenue as a special agent? A. That's right.

Q. His superiors were Keys and McQuillan? A. Yes.

Q. And you developed a very close friendship with Mr. Mellin over the years, did you not? A. Yes.

Mr. Christy: May we have the witness testify, your Honor?

The Court: Yes. Go ahead.

Q. How frequently would Mr. Keys and Mr. McQuillan send an agent, whether he were Mr. Mellin or not, around to see you in the Costello tax investigation? A. I wouldn't know how many times they came specifically for the Costello matter, but this passing of information went on for a long time, and they would be over on many matters, not only the Costello matter.

Q. I am directing your attention now, Mr. Grafenecker, to the Costello matter. A. It would be hard for me to say how many instances was the Costello matter and how many instances were nine other matters.

[185] Q. When an agent did come in the Costello matter, did you provide him with the interceptions themselves, the transcriptions? I would give them whatever information I had, including the wire taps.

By the Court:

Q. In other words, if he asked about X and your index showed that X occurred in a statement that referred also to A, B and C, you would give him the whole conversation as recorded? A. I would give it to him.

Q. You wouldn't limit it in any way? A. No, I would give him the entire thing.

By Mr. Williams:

Q. You would allow them to have access to the records by themselves in some room that you would provide for them? A. I would.

Q. And they would remain and study the records at their leisure? A. That's right.

Q. And included among the records that you would give them would be the interceptions themselves on the yellow foolscap paper as reported by the monitors; is that right? [186] A. That's right.

Q. Do you recall that in 1946 you were introduced to Mr. Cordes? A. I recall I was introduced to him. I couldn't pin down the year.

Q. Was it Mr. Mellin who introduced you to him? A. Yes.

Q. Did the practice of providing access to your files continue after 1946 when Mr. Cordes was introduced to you? A. Yes.

Q. Did Mr. Cordes call you and ask you for information on Costello? A. He did.

Q. Were agents sent over to get information on Costello? A. Yes.

Q. Were they given the transcriptions of intercepted conversations? A. Yes, sir.

Q. Did Mr. Mellin come in that case himself? A. He did.

Q. Did others come? A. There were others.

[187] Q. Do you recall any of them by name? A. No, I do not.

Q. Did Mr. Cordes come at any time himself? A. I believe Mr. Cordes came once, possibly twice.

Q. When he came himself, was the information made available to him in the same way as it was to the agents? A. I don't recall whether I gave it to him or whether I had given it to Mr. Mellin, or one of the other agents.

Q. Do you recall what the purpose was for his coming over to see you? A. One of them was the Costello matter. It could be other matters also.

Q. But you recall, do you, that your contact with Cordes originated on the Costello matter? A. That's right.

Q. As a result of an introduction by Mellin? A. That's correct.

Q. Thereafter you had contact with Cordes, Mellin and other agents on the Costello case? A. That's correct.

Q. And that lasted through what years? [188] A. I would say up to the time I retired. I can't pin down the period of time other than that it was a continuing thing.

Q. After Mellin retired from the Bureau, did you have contact with other agents than Mellin at the request of Cordes in the Costello case? A. I believe Mr. Cordes called me and sent an agent over.

Q. Sent agents over, did he? A. Yes.

Q. How frequently would that happen, Mr. Grafenecker, to the best of your recollection, in the Costello case? A. I can't say how many times it would be confined to the Costello case, because there were other matters also.

Q. Can you give us your best estimate? Would it be as much as a couple of times a month? A. No.

Q. Would it run several times in one month and then there would be a hiatus? A. It is hard for me to say. I would say that it happened with Mr. Cordes or one of Mr. Cordes' agents maybe two or three occasions.

[189] Q. I am talking about Mellin as well as Mr. Cordes himself. A. I saw Mellin more often than I saw Mr. Cordes.

Q. I am talking now, Mr. Grafenecker, about any agents from the Bureau of Internal Revenue in the Costello matter. A. I couldn't say to you that they came every month or every two months. I wouldn't know on what particular matter. It was a continuing situation. They would come over on other matters, besides the Costello matter. I cannot say whether it would be two or three times on the Costello matter or six times on some other matter. I cannot divide it.

Q. But it was a regular course of conduct over the years while you were there; is that right? A. That's correct.

Q. That course of conduct was not broken during your period there? A. No, it was not.

Q. It was common practice on the part of the Bureau to use your files? A. That's right.

Q. Did you ever deny them acess to your files in the Costello case? [190] A. No, I did not.

Q. It was made available at all times? A. Whenever they requested them.

Q. Did you in turn receive information from them? A. I did.

Q. In matters of interest to you? A. Yes.

Q. Who would you regard as your chief liaison with the Bureau during the years in which you were head of the Detective Squad? A. Mr. Mellin.

Q. Do you recall any conversations on the Costello case with Mr. Leath? A. No.

Q. You have no recollection of that? No.

Q. Do you recall Mr. Stackvis? A. That name doesn't strike a chord.

Q. You do recall there were other agents who came than the ones you have identified for us? A. That's correct.

Q. I take it that the agent who called you would not necessarily be the one who came to see the records? A. The agent wouldn't call me. I would get a [191] Call from either Mr. Mellin or Mr. Keys or Mr. McQuillan that an agent would be over.

Q. Or Mr. Cordes? A. Or Mr. Cordes. When the agent came, he would identify himself with his credentials and I would give him access to the file.

Q. Do you recall that there were certain items among the intercepted conversations of Costello which were of interest to the agents who came from the Bureau of Internal Revenue? A. I have no recollection of any specific items. I would just give them the report and let them take what they wanted out of there.

The Court: Was it ever their practice to show you what they had taken off?

The Witness: No.

By Mr. Williams:

Q. If I may attempt to refresh your recollection on that, was there ever a time when they showed some interest in the Cadillac car alleged to have been purchased by the defendant? A. I recall such an incident, but I don't know whether it was an Internal Revenue agent or whether it was some other agency.

[192] Q. Do you recall any instance concerning the mausoleum that the defendant erected in memory of his parents at a cemetery here in New York? A. I recall such conversations on the wire taps.

Q. You do? A. Yes.

Q. Do you recall conversations concerning the Cadillac car on wire taps? A. Yes, sir.

Q. Were there conversations on these wire taps of Mrs. Costello? A. Yes, sir.

Q. Were there many or few conversations of hers? A. I would say many.

Q. Did they relate to purchases that she was making? A. I would say yes.

Q. Was it your practice, Mr. Grafenecker, to read the transcriptions of these conversations? A. Oh, yes.

Q. You read them every day? A. Every day.

Q. So that you had some running familiarity with what was being discussed over the Costello phone? [193] A. Yes.

Q. And that running familiarity was a familiarity with what Mrs. Costello was talking about too, was it not? A. Yes.

Q. And isn't it a fact that the transcriptions in your files show in many instances calls to stores and service agencies from which she was either buying merchandise or buying services? A. I would say yes.

Q. And that situation obtained through the years, did it not? A. That's right.

Q. Will your files, Mr. Grafenecker, show calls intercepted in which Mr. Costello was a participant, conversations in which he was a participant, when the taps were not on his phone at Central Park West? A. I don't follow your question.

Q. I will try to state it more simply. I think that is an awkward way of asking it.

Suppose you had an interception order on the telephone of Mr. X on Fifth Avenue, and Mr. X should confer with Mr. Costello on the telephone during the period when his phone was monitored. Will your files readily [194] show that conversation if you looked under "Costello"? A. Oh, yes.

Q. It would? A. Yes.

Q. So your files wil show all intercepted Costello conversations regardless of where the interception was actually placed? A. That's right.

Q. Do you recall at this time persons whose lines were intercepted, who conferred or talked on the telephone with the defendant and whose interceptions would be in the files of the District Attorney? A. No, I have no recollection without seeing the record.

Q. You don't have a specific recollection of individual persons, but you do recall that that situation did exist and did obtain? A. It occurred on some occasions. But I have no recollection of what places or the dates or the time, and the only way I would be able to testify to that would be to examine the records.

Q. What would be the effect of having two taps on one and the same line, Mr. Grafenecker? Could that be done? [195] A. Two taps on the same line?

Q. Two taps on the same line. A. It could be done.

Q. It would create interference? A. Yes, it would.

Q. It would be readily discernible to the conversants on the phone? A. And to the phone company.

Q. So it isn't practical or feasible, nor has it been over the years, for there to be two taps on one and the same line? A. No, it isn't feasible.

Q. What was the practice of your office if you went out and found a tap on a line which you intended to tap?

Mr. Christy: I object to this. It seems to me it is irrelevant.

The Court: Overruled.

A. Well, if we knew the other agency that was on there and if we could trust them, we would try to make a deal and leave one on and swap the information.

Q. Was that common law enforcement practice over the years? A. It was with me.

[196] Q. Was that true in so far as your relationship with the Bureau of Internal Revenue was concerned? A. It was my relationship with Mellin, yes.

William J. Grafenecker—for Defendant—Direct

Q. Mr. Grafenecker, do you recall a time when the Costello interceptions were made available to Bureau of Internal Revenue agents on loan to the Kefauver Committee?

The Court: To those agents who were on loan?
Mr. Willams: Yes.

A. I personally had nothing to do with that matter. There was another man in the office who handled the liaison for the District Attorney's Office with the Kefauver Committee.

[197] Q. Who was that, sir ? A. I believe it was Mr. O'Connor.

Q. Sir? A. I believe it was Mr. O'Connor.

The Court: Was he a police officer?
The Witness: No, he was an assistant district attorney.
The Court: I see.

Q. Well, to your knowledge, Mr. Grafenecker, was such an arrangement ever made? A. As to whether or not the material in the District Attorney's Office was given to the Kefauver Committee?

Q. Given to Internal Revenue agents on loan to—well, given to the Kefauver Committee, yes. A. I understand they were given to the Kefauver Committee.

Q. And the agents who worked in liaison with the District Attorney's Office in this matter were Bureau of Internal Revenue agents on loan to the Kefauver Committee, isn't that so? A. I don't know whether they were or not.

Q. Wasn't that your understanding at the time?

Mr. Christy: Well, your Honor, he says he [198] doesn't know.

The Court: Sus'ained.

Mr. Williams: Your Honor, this is a good stopping-off place if we may do it at this time, and if we may make our record on the other matter.

The Court: Oh, yes. Very well. It will probably be a good idea.

All right, we will adjourn now until 10:30 tomorrow morning.

(The following proceedings took place in the robing room:)

Mr. Williams: Your Honor, I came to the bench earlier this afternoon to say to you that one of the witnesses who was on the stand during today's first proceeding, Mr. Bolich, was asked a question—it was just a broadshot question—and I believe it was substantially what agencies he cooperated with in the handling of the Costello tax investigation, and I was hoping to elicit from him that he cooperated with the District Attorney's Office, but he then proceeded to say that he cooperated with eight or nine agencies and named them. The record will show the ones he named. I don't recall them.

And of course I only pressed him on the [199] District Attorney's Office because that was the sole concern of our interrogation on the issues in this case.

When he left the stand he apparently thought the question had a greater significance than I intended because he said to me, "I omitted one agency that I know he did cooperate with," and I said, "What was that?"

He said, "The Postal Department," and I was somewhat surprised because I could not see how the Postal Department could have any relationship to this tax investigation, but he said, "It was our standard practice to have a

mail watch in a case of this kind and we had a mail watch in this case."

Well, that terminology meant something to me, which it might not mean to someone else, because I have had a close experience with a mail watch in the past and have done some examination into the law on the subject, and as soon as I heard that I conferred with Mr. Wadden here if he had heard previously of a mail watch, and he not only had not heard of it but he did not know the significance of it.

So I came back to court and I approached the bench and I said to your Honor that I would like tonight—[200] and I will bend my most diligent efforts in this—to attempt to find out what in the way of a mail watch was put into this case or put on Costello and report back to the Court in the morning, but I wanted to say in all fairness to Mr. Christy and Mr. Ruskin that if we find that there was a mail watch in this case on Costello, then I want to ask your Honor to indulge us to the extent of allowing us to add that to the motion as a factor to be considered on the motion for a new trial on the basis of newly-discovered evidence because I would like the opportunity to at least make the legal argument that I feel is most important on that matter.

The Court: Yes.

Mr. Williams: And I would come back tomorrow and let you know whether there is a factual basis for this or not, but I thought I ought to call it to Mr. Christy's attention and Mr. Ruskin's attention at the earliest moment and your Honor's attention, so that there would be the minimum of surprise in this thing which is a maximum surprise to us.

The Court: All right. Well, we will wait until tomorrow to see what you find out tonight, and then when you are ready to make your request or motion [201] to amend the grounds of your motion, you will make whatever motions you think are appropriate.

Colloquy

Mr. Williams: Yes, sir.

The Court: All right. I will hear you at that time.

Mr. Christy: Your Honor, with regard to what Mr. Williams has just said, let me say that the Government is not aware that any mail watch was ever put on Costello's mail, and my understanding of mail watch is merely that they record names and addresses of the addressor of the letter, and it seems to me that that would have no relevance at all in this proceeding.

The Court: Well, that may be. I don't know. All Mr. Williams wants is to find out what he can about it and if in his opinion it justifies a motion to amend the grounds of his motion for a new trial, he be allowed to amend.

(Adjourned to June 14, 1957 at 10.30 o'clock a.m.)

* * *

[212] Mr. Williams: Your Honor, we are prepared to develop further the matter which we discussed at the end of the day yesterday. Overnight, in accordance with my commitment to your Honor, I have looked further into this question as to whether or not there was a mail watch put on this defendant by the Bureau of Internal Revenue incident to its investigation of the 1954 tax case, and I am satisfied to the point that I am willing to represent to the Court at this moment that there was such a mail watch, and I think Mr. Christy's statement was, as I understood it yesterday, that it has come as a surprise equally to Mr. Christy as it has to us, so that I would like to ask your Honor if we may, in the light of the fact that we have all the witnesses here at the present time, some of them from far off, if we may add a paragraph to our moving papers and allege an additional ground for the relief which we ask the fact that there was an illegal mail watch imposed on this defendant in violation of the Criminal Code of the United States, Title 18, both Section 1701 and Section 1703.

Colloquy

[213] Mr. Christy: Your Honor, I would oppose that. I think that it would protract the hearing interminably on a point that I think, again, is academic. The Government will concede that at some time there was a mail watch on Costello. But under Section 41.4 of the 1948 Postal Laws and Regulations, and under '39 Code of Federal Regulations, 92, the type of mail watch which I think Mr. Williams has in mind is perfectly permissible, that is, that the Post Office is permitted to look at letters, addressed in this case to Costello, to take down the postmark, to take down the return address, and that is the extent of any mail watch in this case. Under the applicable regulations, that is perfectly permissible and was held so in the case of United States v. Coplon, cited in 88 F. Supp. 921. I have the case here, if your Honor would care to look at it.

Mr. Williams: It is my information that in this case the mail was delayed while tracings were made by the Postal Department of the mail that was addressed to the defendant, and that this was in violation of 1701, and we have one precedent on this subject, your Honor, a precedent which was inquired into by a [214] special committee of the United States Senate in 1954, where they found that a mail watch had been put on a member of the Senate, and a recommendation went out of the United States Senate to the Department of Justice for prosecution.

So I think we have here a criminal statute that has been transgressed.

The Court: Was there a prosecution that resulted from that?

Mr. Williams: There was not, your Honor. There was not a prosecution to this date. I don't anticipate there will be one. But the fact of the matter is that this criminal statute, 1701 and 17—

The Court: Is it your position that you expect to offer proof or offer evidence on which you will ask the Court to

find that the kind of mail watch on the defendant's mail was illegal and not within the Coplon case?

Mr. Williams: Yes, sir. It is my position that the mail watch imposed upon him was a transgression of two statutes, both criminal in nature.

Mr. Christy: Mr. Williams has adverted to tracings. Your Honor, I understand that tracings are also perfectly permissible under the applicable [215] regulations. The only thing that Mr. Williams could claim, it seems to me, is that the Government opened Costello's mail, and he has not made any such allegations.

He has come in and made other shocking allegations of what the Government has done without any foundation in fact. I think he should be required to state precisely what he intends to prove, and there should be some law submitted to the Court as to whether or not that would even vitiate the conviction if the facts were found to be as he alleges. Otherwise we will protract this hearing interminably, your Honor.

Mr. Williams: I certainly don't like to be in the position of making any allegations against the Government or anyone else without any foundation in fact.

I understood that just a moment ago the prosecutor conceded to the Court that there was a mail watch at least in this case. So I am kind of bewildered, if the Court please, about the charge that I have made a shocking allegation of misconduct without any foundation in fact.

Mr. Christy: We do concede there was a [216] mail watch in accordance with the applicable regulations and nothing else.

The Court: Your adversary claims the contrary.

Mr. Christy: Your Honor, if he is going to prove merely that we took down the names of the return addresses, the postmark and possibly tracings, that makes no difference.

Colloquy

The Court: I don't know what he is going to prove. But he has indicated to me, in answer to my question, that he proposes to adduce evidence here that whatever was done was something beyond the permissible limits under the regulations in the statutes. That, I take it, is a sufficient claim to allow him to produce proof in support of that charge.

Mr. Christy: Very well, your Honor.

The Court: Very well.

Mr. Williams, I did not get the point as to whether or not you wanted to go into that right away with witnesses that you have here. I don't know what your point is.

Mr. Williams: My suggestion, if the Court please, is that we simply add a paragraph to the moving papers and, incident to the examination of the [217] witnesses who are here present and available for interrogation, that we ask questions concerning that fact. I would think it would not add very much to the time that this motion will take or to the length of the questioning of the witnesses, because either it was in existence or it wasn't, and we will find out very quickly.

The Court: Very well.

Who was the witness on the stand?

Mr. Williams: Mr. Grafenecker, and I tender him for cross-examination.

The Court: You had concluded your direct examination?

Mr. Williams: Yes, sir.

William J. Grafenecker—for Defendant—Cross

WILLIAM J. GRAFENECKER, resumed.

The Court: So that the record will be straight I don't know that I formally ruled on Mr. Williams' motion. I grant the motion.

Mr. Williams: I will submit an amended pleading, your Honor, at the earliest moment, both to the Court and Mr. Christy. It will simply be an additional paragraph.

The Court: Very well.

[218] Mr. Christy: Before I take up cross examination, your Honor, we again have this problem of witnesses. I see in court Mr. Ryan of the Narcotics Bureau and Mr. Buckley of the ATU. I wonder if we could get from Mr. Williams some agreement as to the time that they would be needed, because both of these men hold very responsible posts and I think it is unfair to tie them up.

The Court: I understood Mr. Williams' position yesterday to be that they need not come back each day; that they were to come back only when called.

Mr. Williams: That is agreeable to me.

Mr. Christy: I was advised Mr. Williams would call me and let me know the time he wanted each of the witnesses. I have received no call.

The Court: In view of that, it seems to me that the witnesses need not stay here; is that right?

Mr. Williams: Yes.

The Court: You have now the witnesses that you propose to call today, and those witnesses do not include Major Ryan or the other gentleman?

Mr. Williams: That's right, assuming the [219] Revenue agents are here that we agreed upon yesterday.

Mr. Christy: I think Mr. Williams refers to the Treasury agents; yes, they are here.

William J. Grafenecker—for Defendant—Cross

Cross-examination by Mr. Christy:

Q. Yesterday, Captain, I think you testified that, to your knowledge, there were no taps on any phone of Frank Costello prior to 1943? A. On Costello, right.

Q. On any phone of Frank Costello? A. That's correct.

Q. That would include his home phone or any business phone; is that right? A. That's correct.

Q. You also said that there were taps on in the 30s to get certain conversations of Frank Costello; is that right? A. My recollection is that in the 1930s we had many wire taps——

Q. Just a minute, Captain. Listen to my question. Did you not say yesterday that in the 1930s there were certain taps put on in order to get conversations of Frank Costello? A. If you permit me to say that in the 1930s we had many wire taps on for many reasons, and there were [220] cross conversations of these people which would mention Mr. Costello.

Q. You said yesterday, and I will read you the question and answer:

"Q. Were there wire taps that were put in to get his conversation? A. Yes."

Q. Do you recall that question and that answer? A. Yes, I do.

Q. So you say now that there were taps put in to get Frank Costello's telephone conversations? A. But not at his residence or any of Costello's businesses. There would be various public restaurants and other persons.

Q. All right. Who were the other persons whose lines were tapped? A. Practically every well known racketeer and places that they frequented.

Q. Do you recall any specific one? A. Schultz, Coll, Vincent Coll, Legs Diamond, Lanza.

Q. You didn't recall those yesterday? A. I was asked the question, as I understood the question yesterday, on Mr. Costello's wires.

William J. Grafenecker—for Defendant—Cross

[221] Q. Well, you answered that your only recollection was one on an attorney by the name of Wolf. A. That's correct.

Q. What was Wolf's first name, do you recall? A. I believe it was George.

Q. George Wolf? A. That's right.

Q. And when was this tap put on? A. My best recollection is it was somewhere in 1935, 1936, possibly 1937.

Q. This was the George Wolf who later represented Frank Costello? A. I believe it is.

The Court: What was the date you said that that tap was on?

The Witness: My recollection is it was either 1935, 1936, possibly 1937.

By Mr. Christy:

Q. Is it your testimony—

The Court: Was that tap on Mr. Wolf's home telephone or his office telephone?

The Witness: It was an office telephone on lower Broadway.

Q. Was that tap put on, Captain, in order to get [222] conversations of Costello? A. No.

Q. It was put on for an entirely different reason, wasn't it? A. That's correct.

Q. So yesterday, when you said that "My only recollection of one is an attorney by the name of Wolf," you were incorrect? A. Incorrect in so far as the purpose of the wire was to get any information on Costello. That was not the purpose at the time.

Q. You were incorrect if you said that yesterday? A. If I interpreted it to say it was to get Costello, yes.

Q. That is what the questions and answers indicate. You know perfectly well it was put on for an entirely different purpose. A. Yes, I do.

Q. As a matter of fact, Costello didn't even know Wolf at that time? A. That I don't know.

Q. Was there any other specific tap that you recall being put in to get Costello's telephone conversations? [223] A. None other than I testified now, that all well known racketeers and criminals had their wires tapped. In that connection, the tap was for the purpose of finding out what was going on in organized crime. That was our main purpose.

> The Court: By that do you mean, Captain, that when these taps were put on it was not the purpose to get conversations by the defendant Costello, except in so far as they might come over those telephones?
>
> The Witness: Costello or any other racketeer or any other person we believed was engaged in crime in an organized manner.

By Mr. Christy:

Q. This was just a general wire tapping? A. That's correct.

Q. You were not specifically trying to get a telephone conversation of Frank Costello? A. We were trying to get anything and any kind of evidence against Costello, or any other racketeer.

Q. I ask you, Captain, if you put in any one of these taps for the purpose of getting a conversation of Frank Costello? [224] A. Not for that specific purpose, no.

Q. So I take it, then, between the period 1934 and 1943 there was no tap on Costello's phone; right? A. Not to my knowledge.

Q. And you did not put in any tap for the specific purpose of getting any conversation of Frank Costello? A. That's correct.

Q. You knew William Mellin, who was an Intelligence agent; right? A. Yes, I did.

Q. And you used to talk to him over these years 1934 to 1943? A. That's correct; beyond 1943.

Q. Let us take the period up to 1943 right now, when the first tap was put in on Costello. Mellin never came to you and told you he was working on a tax case for Costello, did he? A. No, he did not mention that.

Q. During that period of time? A. No.

Q. As a matter of fact, part of that time he was working on the Dutch Schultz case and other cases? A. That's right.

[225] Q. That is what he was primarily interested in? A. I don't know what his interest was, except he was from the Bureau of Internal Revenue and information I had that he needed, if I had it he got it, and vice versa. If he had information I would ask him and he would give it to me. It was a mutual swapping of information from one law enforcement officer to another. Not on the Costello matter but all matters.

Q. All the matters you were working on? A. Yes.

Q. And you were working on a great many matters? A. Yes.

Q. And so was he? A. That's correct.

Q. You can't recall that at any time between 1934 and 1943 you ever provided Mellin with some tap or transcript of Costello's telephone conversation? A. Not that I can recall of his telephone conversations, but there were many items over those years that I gave to the Bureau of Internal Revenue and to Mellin where other people would be talking on all of these cross wires we had and in which Costello's name would be mentioned and in which subjects he would be [226] interested and that would be of interest to us would be mentioned.

Q. That is something you would pick up in a general investigation? A. That is true.

Q. And you probably had a surveillance on Costello from time to time? A. We did.

Q. And you probably found out other information about him from time to time? A. We did.

Q. And you provided Mellin with that type of information also? A. I provided him with any information I had whether it be surveillance, wire taps or underworld information I had.

Q. But you can't recall ever giving him any transcripts of taps, or whatever you wish to call them, reflecting conversations of Frank Costello? A. I can't recall any.

Q. Coming up to 1943, there was a tap put on Costello's telephone? A. That's correct.

Q. At this time in 1943, you were, as I understand [227] it, the head of the Detective Squad or group at the District Attorney's Office? A. That's right.

Q. And that was at a time when Mr. Hogan was the District Attorney? A. That's right.

Q. And you had quite a few men working for you? A. Right.

Q. Incidentally, Captain, do you know how long it takes to put in a tap, physically put it in? A. That would all depend on the location of the cables and the spares, and so forth. It is a technical problem. Some you could put in in five minutes and some might take you days.

Q. Would you say that there was an average? A. You couldn't strike an average. You never know. It is not only the physical tapping of the wire, it is the locating of the premises where you can sit, where you will not be observed by anyone. Sometimes in later years you couldn't get such a space, you couldn't get a basement or you couldn't get an apartment, you couldn't just get a room, and that would be more delay than any of the physical setup of tapping the phone.

[228] Q. It would be extraordinary, wouldn't it, if a man could put 10 taps in in one day? A. No. It all depends. We have done it.

Q. You have? A. Yes.

Q. One man? A. Oh, sure.

Q. Ten in one day? A. Sure.

Q. How many men would it take to man those 10 taps? A. It all depends on how many hours you wanted it covered. It would vary. I myself always insisted on two men being on wire tap together.

Q. So it would take a minimum of 20 men? A. From my standpoint, I would have two men on for the safety of the men. We had an occasion years back where a man got——

Q. Just a second.

The Court: It was your practice to put two?
The Witness: That's right.

Q. That, I take it, would be the standard practice? A. No, it is not. I cite the reason we put [229] two on is we had an unfortunate experience with man one time.

The Court: You deemed it necessary to have two, but within your experience were there other agencies that used less than two?
The Witness: Yes, including ours at one point.

By Mr. Christy:

Q. In your position as head of the detectives, you had no authority to put a tap on by yourself, did you? A. Since when? What date?

Q. In 1943? A. No, not in 1943.

Q. In fact, all taps had to be authorized by Frank Hogan, the District Attorney? A. From 1943 on.

Q. From 1943 on? A. Right.

William J. Grafenecker—for Defendant—Cross

Q. In other words, he would determine when he needed a tap in connection with some matter under investigation and he would get a court order? A. Yes, he would prepare the affidavit and get a court order.

[230] Q. I take it that order would be turned over to you for execution? A. That's correct.

Q. But you yourself could not apply for an order and get one? A. Under Mr. Hogan's rules, no. A police officer above the rank of sergeant could, under the law, but on the policy of the District Attorney's Office only Mr. Hogan could okay a wire tap.

The Court: From 1943 on, did you conduct your affairs in accordance with that policy of Mr. Hogan?

The Witness: I did.

Q. So all taps that you put on were authorized by Frank Hogan? A. From 1943.

Q. And they were all determined by Mr. Hogan as to when they were necessary in connection with the investigations that he had? A. That's right.

Q. Mellin never asked you to put in a tap, did he? A. No.

Q. No other Treasury agent ever asked you to [231] put in a tap on Costello's phone? A. No.

Q. No other Treasury agent asked you to put in a tap to get Costello's conversations? A. No.

Q. Is that right? A. That's right.

Q. This tap that went in on Costello in 1943, do you remember when it was put in during the year? A. I don't recall the month.

Q. Do you recall how long it lasted? A. No, I would have to consult the records on that.

Q. What is your best recollection? A. My best recollection is that the wire went in in 1943, and my recollection is that it would have been covered about 70 per cent of the time from then on.

The Court: From then on until when?

The Witness: It continued on up—my best recollection is it would be 1948, 1949.

Q. Captain, if I tell you that a tap was installed on Costello's phone on May 7, 1943, and was removed on November 5, 1943, does that refresh your recollection? A. That sounds about—that would be the first [232] court order.

Q. That would be the first tap? A. That's right.

Q. That refreshes your recollection? A. It refreshes my recollection to the extent that the policy at that time was to have an order run for six months and then have it renewed.

Q. If the tap was taken off on November 5, 1943, when was the next tap put on, to the best of your recollection? A. My recollection would be that a new court order was obtained and it was continued on. I don't think it would have been removed. I think the new court order would have taken effect so that we wouldn't have to move out the plant.

Q. If I tell you, Captain, that the next tap on Costello's telephone was installed on June 11, 1946, and removed on September 10, 1946, does that refresh your recollection as to when the next tap was? A. No, it doesn't. I would have to see the record.

Q. But if the records show that, you wouldn't dispute it? A. Oh, no.

[233] Q. You don't have any independent recollection now that there was a tap from November, 1943, to June of 1946? A. No, I don't have the recollection it was continuous. My recollection is that we covered it 70 per cent of the time.

Q. Seventy per cent of the time that it was on or 70 per cent of what? A. Seventy per cent of the time it was on that it was a continuous tap. That's my best recollection.

William J. Grafenecker—for Defendant—Cross

Q. You mean on the tap between May 7, 1943, and 11 5 43, the tap was on 70 per cent of that time? A. No. I believe that tap was on continuously. Thereafter, it is my recollection that we covered it 70 per cent of the time.

Q. Do you have any independent recollection that there was a tap between November 5, 1943, and June 11, 1946? A. I have a recollection that the wire was tapped. As to the dates, I would have to have my recollection refreshed by looking at the orders.

Q. If the records show these were the only taps put in, you wouldn't dispute them? A. No.

[234] Q. Do you recall when the next tap was after 1946? A. My recollection is that it continued.

Q. If I tell you that the next tap was put in on September 20, 1950, and ran until April 15, 1952, would that refresh your recollection? A. It would to the extent that I knew the wire was on for a long period of time, but I would have to look at the records.

[235] Q. You don't have any independent recollection that there was a tap on Costello's telephone between September 10, 1946 and September 20, 1950? A. Not the exact dates, no. I have a recollection that the wire was on continuously. That's my best recollection. I would have to look at the records to see what the exact dates were. I do not know what the exact dates were.

Q. In other words, if the records show that those were the only dates that taps were put on, you wouldn't dispute the records? A. No, I would not.

Q. Do you recall any tap after April 15, 1952, that is, after 1952 up to 1954? A. I can't say. I would have to look at the records.

Q. You don't have any independent recollection of a tap during that period? A. It is my best impression that it was on, but I would have to look at the records.

William J. Grafenecker—for Defendant—Cross

By the Court:

Q. By this do you mean, Captain, it is your recollection as long as you were in the Department beginning in 1943, there was a tap on? [236] A. On and off, but I don't know the exact dates. I would have to refresh my recollection by looking at either the plant card or the court order.

By Mr. Christy:

Q. You haven't refreshed your recollection with anything recently? A. I have not.

Q. When you testified yesterday that there was a continuing tap between 1943 and 1954, that is just your impression? A. That's my best recollection at the time without consulting the records.

Q. But if the records show that there were—

> The Court: Let me have that clearly now. The witness has said many times he is giving his recollection but in order to be precise he would have to see the records and if the records disagree with his recollection he would not dispute the records.

Q. Yesterday you were asked if there were any other telephones tapped where Costello was expected to make calls, and you said, "I believe there was one."

What place are you referring to? A. I was referring to a party by the name of Martin.

[237] Q. That is the only one that you are referring to? A. That is my recollection.

Q. And when was that tap put in? A. I cannot recall the dates. I would have to look at the records.

William J. Grafenecker—for Defendant—Cross

By the Court:

Q. Do you have any recollection of the year, Captain? A. I would be—

Q. I am not trying to force you to do it. When you said "date" were you thinking of a particular day in a particular month, or does that include your lack of recollection as to years as well? A. It does. My recollection is based on that this wire tap wasn't in too long, and therefore—

Q. In any event, you cannot tell us without looking at the records? A. That's right.

The Court: Very well.

By Mr. Christy:

Q. Let me ask you if it fell within the period 1943 to 1954. A. Oh, yes, within that period.

[238] Q. You don't recall how long the tap was in? A. No, I don't.

Q. And I take it you don't recall that there were any actual conversations of Frank Costello? A. My recollection is that there were but I am not sure.

Q. You are not sure? A. I am not sure.

Q. And I take it, then, between 1943 and 1954 that this is the only tap that you can recall that was put in to get conversations of Frank Costello? A. That's correct.

By the Court:

Q. Let me see if I have that clear in mind.

Do you mean by that, Captain, that you had reason to believe that conversations were had between the defendant Costello with somebody else on this phone which you say was under the name of Martin, and in order to listen in on

those conversations which you believed would occur, you put in the tap on the Martin phone? A. That's right.

The Court: I see. All right.

[239] *By Mr. Christy:*

Q. And that is the only such tap that you did put in in 1943 to 1954? A. I believe that is the only one.

The Court: By that you mean for that purpose?

Mr. Christy: That is for the purpose of getting any conversations of Costello.

Q. And with regard to that tap, you don't recall if there were any conversations with Costello? A. I don't recall. My recollection is that there were but I am very hazy on it.

Q. I think you testified that during the period 1943 to 1954 you provided Mellin with certain information similar to that that you had provided him with before 1943. A. That's right.

Q. Mellin never told you when he came over to see you that he was working on the Frank Costello income tax case, did he? A. No.

Q. This was just a continuing exchange— A. Not in those words. Knowing that he was from the Bureau of Internal Revenue, there was no question for me to ask him what he wanted it for. I just assumed [240] what he wanted it for, but he never in so many words said, "I am working on this case or that case."

Q. This was just a continuing exchange of information? A. That's right.

Q. And you were working on a number of cases and he was working on a number of cases? A. I don't know how many cases he was working on but this I do know—

William J. Grafenecker—for Defendant—Cross

By the Court:

Q. Did it come to this, Captain, that Meilin would come in and say, "What have you got on A; what have you got on B; what have got on C?" A. Exactly.

Q. And if you had it, you would give it to him? A Exactly.

Q. And if you were not sure you would say, "Here is some data that we have; look at it yourself"? A. That's right.

Q. And you made a room available to him to look at it; is that what it came down to? A. Yes.

The Court: Very well.

[241] *By Mr. Christy:*

Q. How often did he come in? A. Quite often.

Q. Well, once a week? A. No, it wasn't like that. It would run—if I got a phone call—maybe two months, three months.

Q. Maybe five or six times a year? A. About that.

Q. And did you talk to him alone when he came in? A. Yes.

Q. And when you gave him this information, was there anybody else there? A. I don't believe so.

Q. And he never told you that he was working in the Costello income tax case? A. Not in those many words, no.

Q. And you just turned over whatever information you had available to him?

The Court: That is repetitious. We have just gone through that. Let us get along.

We will take our recess.

(A short recess.)

William J. Grafenecker—for Defendant—Cross

[242] *By Mr. Christy:*

Q. Before we recessed, Captain, I think you said on these occasions when Mellin came over to you—and we are now talking about the period 1943 to 1954—he saw you alone? A. He would come in the office, yes.

Q. Was there anybody else there with you when you used to talk to him? A. I don't recall if anybody was present.

Q. You were the only officer there that he dealt with; is that correct? A. That's right.

Q. Did he ever deal with a man called Haines? A. That I don't know.

Q. Your recollection is that he dealt just with you? A. My recollection is that he came and asked me for information. Whether he got information from Haines, I don't know.

Q. You said yesterday that you recalled giving or providing other agents with information that you had in your files? A. That's right.

Q. On a few occasions? [243] A. Yes.

The Court: You mean other Treasury agents?
Mr. Christy: Yes.

By Mr. Christy:

Q. Who were these other Treasury agents that you gave information to? A. The only names I recall are Cordes, Ronayne, whose name—before yesterday I did not know the name of Ronayne—and I see some men in the room back here, whose names I don't know.

Q. Let me ask you if you ever gave any of these Costello wire taps or information on the taps to an agent named William or Wilfred Leith?

William J. Grafenecker—for Defendant—Cross

Mr. Christy: Will you stand up, Mr. Leith, please.

(Mr. Leith rises.)

A. I don't remember this man.

Q. You never gave him any information? A. I don't recall that I ever gave him any.

Q. You never gave any information, as I have described, to Robert Murphy?

Mr. Christy: Will you stand up, Mr. Murphy.

(Mr. Murphy rises.)

A. I don't recognize Mr. Murphy and I don't recall [244] the name.

Q. You didn't give any information to an Internal Revenue agent named Allan Stockvis, did you? A. That name sounds familiar. I don't know whether I did or not.

Q. You can't recall now? A. I can't recall.

Q. You did not give any of this information, as I have described, to an agent named Edward Dolan, did you? A. I believe I met Mr. Dolan. I can't recall whether or not he was one of the agents that I gave information to.

Q. As you sit there now you cannot recall giving any of this information to Agent Dolan? A. That's correct.

Q. You didn't give any of this information, as I have described, to an agent named John McElligott? A. That name sounds familiar. I don't recall giving him information.

Q. You cannot recall ever giving him any of this information? A. That's right.

Q. You never gave any of this information to an [245] Internal Revenue agent named Al Sohn? A. That name doesn't strike me. I can't recall.

William J. Grafenecker—for Defendant—Cross

Q. You never gave any of this information, such as I have described, to an agent named John McIntyre, did you? A. That name doesn't strike me.

Q. You never gave any of this information to an agent named Pete Geissler? A. The name is familiar, but I don't know whether I did.

Q. As you sit there now you cannot recall ever giving Agent Geissler any of this information that I have described? A. I can't recall.

[246] Q. You never gave any of this information that I have described to me, did you? A. I don't believe I knew you, Mr. Christy.

Q. You never gave any of it to an assistant United States attorney named Powell Pierpont? A. I don't know him.

Q. You don't know that name, do you? A. I do not.

Q. And you never gave any of this information to an assistant United States attorney named Whitney North Seymour, Jr.? A. I don't know the gentleman.

Q. And you never gave any of this information to former chief assistant United States attorney Lloyd F. MacMahon? A. I don't know him.

The Court: You don't know whether you did or not?

The Witness: I don't know the name. I couldn't have given it to him.

Q. You say you didn't talk to an agent named Whitman Cordes on occasion? A. That's right.

Q. I think you said yesterday that you talked [247] to Mr. Cordes or one of Mr. Cordes' agents maybe on two or three occasions; is that your best recollection? A. My recollection is I talked to Mr. Cordes on two or three occasions, and perhaps one of his agents the same amount, about two or three times.

William J. Grafenecker—for Defendant—Cross

Q. And that would be from the period 1943 to 1954? A. No, I testified that way yesterday and I would like to correct that, if I may. Up to about 1952 with Mr. Cordes.

Q. Up to 1952? A. Somewhere during that period.

Q. That would be 1943 to 1952? A. 1952, somewhere around there.

Q. And you can't recall the name of any other agent you provided information to? A. No, I cannot.

Q. You can't recall giving any of these wire taps on Costello's telephone to Whitman Cordes, can you? A. I have a recollection that I did, and I could be wrong on it. I might have given it to him or one of the agents.

Q. You might have? A. I might have.

[248] Q. But you have no recollection that you did? A. I cannot be positive.

The Court: Either way?

The Witness: Right. Yes, your Honor.

Q. And you say you were exchanging information with Bill Mellin over the years. You can't recall specifically giving him any of the wire taps on Costello's phone, can you? A. Yes, I can. With Mr. Mellin I can. I can recall sitting with him and discussing the wire taps and the information contained therein.

Q. That was on the taps on Costello's telephone? A. That's right.

Q. And you discussed this with him? A. That's right.

Q. Was there any other agent that you recall giving these taps to? A. No.

Q. And when was it that you gave this tap information or these taps to Mellin? A. It would be prior to 1950. I think he retired somewhere around 1950.

Q. He retired in—

William J. Grafenecker—for Defendant—Cross

The Court: The testimony is, Captain, he [249] retired in January 1949.

A. It would be prior to that time.

Q. Yesterday you recalled a conversation about a mausoleum on wire taps. A. Yes.

Q. When did that tap take place? A. I wouldn't know the date. I will have to refresh my recollection from the files.

Q. What do you recall about it? A. I recall that there was such a conversation, and what brings it to my mind is that I had a discussion with one of the detectives who was on the plant and—

Q. Which plant was this? A. On Mr. Costello's residence. And my recollection is that he said something about Mr. Costello being cheap and not paying his bill. That is what brings it to my mind.

Q. And that had to do with the mausoleum? A. That's right.

Q. You don't recall when that was? A. No.

Q. You also recalled a conversation concerning a Cadillac car. What do you recall about that? A. My recollection on that is that an investigator [250] for the Senate Crime Committee was inquiring about a man whose name I believe was Henschel.

Q. H-e-n-s-c-h-e-l. A. And I am not sure whether that is on a wire tap or whether my recollection is about this agent from the Senate Crime Committee. My recollection is that it was an agent from the Senate Crime Committee rather than an Internal Revenue agent.

Q. In other words, you don't recall that it was an Internal Revenue agent or Intelligence agent? A. That's right, I don't know.

Q. And you don't actually recall whether there was any conversation about a Cadillac on the wire tap? A. I cannot say definitely whether it was or whether it is just this

conversation with the man from the Senate Crime Committee.

Q. You don't recall specifically turning over to any Intelligence agent that tap on which you say there was a reference to a mausoleum, do you? A. No, I couldn't recall whether I did or whether I didn't.

Q. You recalled yesterday that there were conversations of Mrs. Costello which you saw. [251] A. That's right.

Q. And you said that you thought that they related to purchases. A. That's right.

Q. Do you recall what purchases? A. No, I don't recall any specific purchases. General conversations with stores, a woman running a household, ordering merchandise, buying stuff.

Q. Do you recall any specific stores? A. No, I do not.

Q. And when were these taps? When did these taps occur; do you recall? A. Sometime between the period of '43 and '50, '51.

By the Court:

Q. Was that also the period in which these taps concerning the mausoleum occurred? A. That's correct.

Q. And was this information or these taps of Mrs. Costello's conversations in the same period? A. They were.

Q. And from the tap that was on the Costello home telephone? A. That's right.

[252] *By Mr. Christy*:

Q. You don't recall any of the stores or any of the persons called? A. No, I do not.

Q. I take it you don't recall turning over to any Intelligence agents any of these particular taps? A. Not specifically.

Q. In fact, you don't know if they ever saw them, do you? A. I don't know whether they noted them.

Q. But you don't know that they even saw them? A. To be specific on certain dates, I wouldn't know. There is no way of me telling what he took or what he didn't take out of there.

Q. Or whether he even saw them, right? A. That's right.

Q. During this period 1943 to 1954 no Intelligence agent ever asked you to put in a tap? A. No.

Q. That is correct? A. That's correct.

Q. And no Intelligence agent ever sat on a tap that you had installed on Costello's phone? A. No.

[253] Q. That is correct? A. That's correct.

Q. You mentioned yesterday two detectives, I believe their names were Crotty and Salke, whom you said belonged to the Bureau or the Treasury Department at one point. A. That's right.

Q. That was in the very early 30s, wasn't it? A. That's right.

Q. Probably before 1934? A. My best recollection is that it would run up to around '34, '35.

Q. And they were only there for a couple of months? A. My recollection is that they were there a long time.

Q. How long? A. My recollection is that they were there a couple of years.

Q. Up to about 1934? A. Somewhere around there.

Mr. Christy: I have no further questions, your Honor.

The Court: Do you have any further questions?

Mr. Williams: I have a few, sir.

William J. Grafenecker—for Defendant—Redirect

[254] *Redirect examination by Mr. Williams:*

Q. Captain Grafenecker, you testified under cross-examination that to your recollection between the years 1930 to 1943 there were not taps on the defendant's home; is that right? A. That's right, as far as I know, to my knowledge.

Q. But you do recall that there were taps on the phones of many other persons who were in communication with this defendant; is that right?

Mr. Christy: No, that is not what he said.
Mr. Williams: I am asking him.
The Court: He is asking him.

A. My recollection is that we had many wires tapped in connection with many investigations that had nothing to do with Costello, and that on occasions on some of these phones there would be cross-references to people talking about Mr. Costello, which would be leads from an investigator's standpoint.

Q. Don't you recall, Captain, when you were working out of Mr. Dewey's office you put taps on Costello's home phone at 241 Central Park West? A. No.

Q. You have no recollection of that? [255] A. I have no recollection of that.

Q. You recall when you were working out of Mr. Dewey's office that you had taps on his home phone at 215 Central Park West? A. I have no recollection of it.

Q. Do you recall that there was a time when Agent Ronayne came to you for information on Costello? A. I learned Ronayne's name yesterday.

Q. You saw him, did you, when he was here? A. That's right.

Q. And you recall that he did come? A. Yes, he did come to the office.

Q. And do you recall that you made available information from taps on Costello's phone? A. My recollection is that I gave him information. Whether they were actual wire taps or not, I do not know. I don't recall.

Q. But you do recall that he came over and that you had available at the time wire taps on Mr. Costello? A. I had information on Costello. I don't remember whether they were wire taps or whether it was general information, but whatever information I had I made available to Mr. Ronayne.

Q. You don't know of what character it was? [256] A. I can't recall now.

Q. You said you had taps, you recalled, on a number of persons you said were suspected of being engaged in criminal activities during 1930, 1931, 1932 and so on through the 30s and in the early 40s. A. It goes back to 1929.

Q. Back to 1929? A. Yes.

Q. But you did not put any on Costello's line? A. Not to my knowledge. Some other people might have but I didn't. I have no knowledge of it.

Q. Do you know whether or not persons in the District Attorney's office did? A. No, I do not.

Q. So it is entirely possible that there were taps on during this period of which you were not cognizant? A. There could be.

Q. You can't shed any light on that this morning? A. No, I cannot.

Q. You say that when the wire went on Mr. Costello's residence in 1943, that by your best recollection it was on about 70 per cent of the time through 1954? A. [256A] A. That is my recollection, but I would have to see the records to clear that up.

[257] Q. You used to read the intercepted conversations every morning, did you not? A. Yes.

Q. It was part of your morning routine? A. It was part of my duties.

William J. Grafenecker—for Defendant—Redirect

Q. So you had a running familiarity as captain of the investigative squad or the police squad attached to Mr. Hogan's office with just who was being tapped at all times, did you not? A. That's right.

Q. From 1943 to 1954 you held that job, did you not? A. I did, sir.

Q. Would you say your estimate of 70 per cent was about as accurate as you could come with respect to making an educated estimate on the subject? A. That's my recollection.

Q. In other words, year in and year out 70 per cent of the time you would find Costello dialogue over telephones on your desk in the morning? A. That would be my recollection.

Q. And you would read that? A. That's right.

Q. And it would be filed along with the rest?

[258] The Court: If the witness hasn't said it a dozen times this morning, Mr. Williams, I have been hearing voices.

Mr. Williams: I think it became a little confused and I was trying to straighten it out.

The Court: I know, but he said two or three times to you again.

By Mr. Williams:

Q. You said on cross examination that you recognized some of the people who are here testifying in this case as persons who came to you looking for information on Costello? A. Yes.

Q. Some of those names you don't know even now? A. I do not.

Q. But you saw some of them here yesterday? A. Yes.

Q. You saw some of them here today? A. Yes.

Q. And these were people other than Cordes, Ronayne and Mellin? A. Yes, sir.

Colloquy

Mr. Williams: I have no further questions.

Mr. Christy: No further questions.

[259] The Court: Very well, Captain, you may step down.

(Witness excused.)

Mr. Williams: Your Honor, at this juncture, having laid the foundation, I would like to call a representative from the District Attorney's Office to offer the records which have been subpoenaed. I was told yesterday that Mr. Hogan had some plans to go to a district attorney's convention, and of course we accommodated him, so whoever is here from that office will suffice for my purposes, who is capable of tendering the records subpoenaed.

Mr. Scotti: The position we take in this proceeding is that we are ready to comply with a direction from the Court to produce such records as the Court deems material and relevant to this proceeding.

I am sure the Court appreciates our natural reluctance to make these intercepted telephonic conversations public. The subpoena does not specify the period of time during which these telephonic conversations they are interested in took place.

I have listened to part of this testimony and I am a little bit puzzled as to the manner in which [260] I am to comply with this subpoena, our office is to comply with this subpoena. If they want copies of transcripts of telephonic conversations intercepted on Costello's wire, that is one thing.

There has been some vague reference to conversations in which Costello allegedly participated on other wires. Frankly, I am a little bit puzzled with respect to that aspect or, rather implied aspect of this request made by Mr. Williams.

Colloquy

The Court: I take it that your position is that the disclosure of that second category might involve the disclosure of evidence affecting other persons.

Mr. Scotti: Yes, your Honor, it is a very delicate problem.

The Court: Either presently under investigation or apparently absolved, if there has been any absolution?

Mr. Scotti: In the Rackets Bureau, all of these taps are under the supervision of the Rackets Bureau. There is no such thing as a closed investigation. If an underworld figure is still alive there is a continuing—

The Court: That is the reason I said [261] if there has been an absolution.

Mr. Scotti: There is a presumption that a man who is a continuing figure in the underworld is a proper subject for continued investigation. So in that sense, it is a continuing investigation.

We are ready to comply with your Honor's direction in this matter.

Mr. Christy: May I be heard, your Honor?

The Court: Yes.

Mr. Christy: I would oppose the production of any of these records on two grounds, your Honor. One, I don't think any proper foundation has been laid. The most that this witness has said is that there were certain conversations of Costello tapped from the period 1943 to 1954. He recalls possibly turning over some of these to Mellin.

Mellin has testified that he never worked as a tax man, that is, other than wire tapper, on either of the two Costello income tax cases.

This last witness, Grafenecker, has testified that he cannot recall making any of these taps available to any other agents of the Intelligence Division or Unit.

Secondly, with regard to these taps on Costello's [262] phone, which Grafenecker has admitted were not instigated by federal officers and federal officers did not participate,

then I see no point in providing Costello with that information, because under the Benanti decision, even if we did get that information at any time, it would be admissable in the federal court.

I respectfully move that the motion of Mr. Williams to have this material produced be denied.

The Court: Mr. Williams?

Mr. Williams: Your Honor, I think we have laid more than ample foundation for the documents that we have called for in this subpoena, and I was careful when I found that the District Attorney found he must initially resist the subpoena. I found this out as a result of a conference that Mr. Wadden and I had with him on Wednesday, June 5th, when we went to him, and I acquainted him with the fact that we were hopeful of getting his records by June 10th in accordance with the understanding that we had with the Court and with the United States Attorney, so that we could peruse these records prior to the hearing. So I visited with Mr. Hogan and I told him that we proposed to subpoena the records, and he asked me to tender the subpoena, and he said that he felt that he must resist [263] showing these records to us until a direction of the court came, which I understood perfectly, of course. He felt that we should lay a foundation in oral hearing for the requisition of these records.

So I realized then, if the Court please, that we could not accomplish what I had hoped so much that we could accomplish, namely, get the records prior to the hearing and have them completely studied and scrutinized by the time we came here yesterday to begin the oral hearing.

So we have come to the position, if the Court please, where we have laid in the record, and I understand from Mr. Scotti—I don't want to misinterpret what he said to me—but I understand from him that there is no longer a resistance from the District Attorney's office to a showing of these records, and I think it probably is because we have

comported with the request of Mr. Hogan, namely, that we lay a foundation.

The Court: I think you certainly misunderstood what he said. There is a resistance, but there is also a recognition that, if the Court orders it, they will not get into a hassel over possible contempt.

[264] Mr. Scotti: That's right, your Honor.

The Court: I would be very greatly surprised if the resistance had evaporated.

Mr. Williams: Maybe it is a lesser resistance than I first met and I regard it as no resistance.

Your Honor, I think we have now shown, through the evidence that has been adduced here over the past two days, that there has been a close cooperation between the Bureau of Internal Revenue and between the District Attorney's office. As a matter of fact, the cooperation was shown to be very close yesterday, when Mr. Grafenecker testified that it was not feasible to have two taps on one line and, where he found a tap already on the line, that, as he put it, "We would make a deal. If we could trust the other agency, we would try to make a deal and leave one on and swap the information."

I asked him if that was the common law enforcement practice, and he said, "It was with me." And I asked him if it was true with the Bureau of Internal Revenue in this matter, and he said, "Yes, it was with Mellin."

So we have here, your Honor, I think, very [265] close hand-in-glove cooperation between the two interested agencies, and we have testimony now that actual interceptions were turned over to the Bureau of Internal Revenue on this defendant, and that information was contained in those interceptions which, even without having seen them, we have already tied in from the dimness of one man's recollection, were closely related to the proof that was ultimately adduced in 1954 in this case.

So I think we have reached that posture of the case, if the Court please, where we ought to be entitled to examine the records and that the District Attorney should be required under the mandate of the subpoena of this court to permit us inspection of the records privately and, of course, with such limitations as your Honor wishes to impose, so that the confidentiality of the relationship or the records will be broken as little as possible.

Mr. Christy: May I reply, your Honor?

The Court: Yes.

Mr. Christy: I think that the only thing Mr. Williams can show is that Grafenecker probably or possibly showed to Mellin certain of these taps in the years 1943 to 1954. But certainly there has been no [266] showing by Mr. Williams of any use by Mellin of the information that he got from these taps or any use of this information in the trial which led to Costello's conviction. And absent that showing, I don't think he is entitled to look at these records.

I might add, with regard to one of the points that Mr. Williams raised—

The Court: Didn't Mr. Mellin testify that whatever he got he turned over to his superior? That is my recollection.

Mr. Christy: I think he said he used to jot down on cards and he brought it back to the Bureau. I don't recall that he testified precisely what he did with it.

[267] The Court: My recollection is he said he brought it back to his superior. That would be the only purpose in getting it. Also my recollection is that Captain Grafenecker testified that whatever he had he gave to Mellin and left to Mellin the process of selection. I think as far as that is concerned the record is all right. That isn't what is concerning me so much as the problem that Mr. Scotti understandably raises, particularly with respect to those recordings which mention other people, which were taken from telephones other than the defendant's. That presents kind of a knotty problem. Even if it be assumed—I am not

deciding that way—but even if it be assumed that those recordings of Costello's own statements made over his phone or any phone ought to be made available, that does not answer the question that Mr. Scotti raises about making available conversations of others. That does not tell us how we could go about the business of separating them.

You appear to have some view about that, Mr. Williams.

Mr. Williams: Yes, I would like to make this suggestion to your Honor. What we have asked for, your Honor, are transcriptions of conversations—

[268] The Court: Suppose we start off by letting me have a copy of the subpoena.

Mr. Williams: Yes, your Honor (handing).

You note we have asked only for conversations in which the defendant or his wife were participants. Of course, those conversations in which he was a participant certainly are not secret or confidential in so far as he is concerned, because he was one of the parties to the conversation. So it seems to me that perhaps the objection held by Mr. Scotti is answered by the fact that we have asked only for Costello conversations, that the substance of which presumably was known to him because he was the conversant.

The Court: This subpoena asks for "all records, including documents, papers, memoranda, transcripts and recordings relating to the interception of telephone conversations of Frank Costello and Loretta Costello, his wife, both of 115 Central Park West, New York, New York."

Do you intend to include there any data that the District Attorney might have made or any of his assistants might have made or was that just a general phrase for the purpose of getting the transcripts of whatever conversations there were?

[269] Mr. Williams: General phrase on which Mr. Hogan and I reached an understanding on Wednesday, the 5th of June.

The Court: You understood that that is what it was? You were not looking for any notes that they may have made on the basis of those conversations?

Mr. Williams: We were hopeful of getting the synopsis of the telephone conversations to avoid reading the whole dialogue, which he clearly understood and said that if we were entitled to the interceptions, then we were entitled to the synopsis described by Mr. Grafenecker.

He also understood that we were asking for the record, the official record of those persons to whom these conversations were made available, and I have reference to other law enforcement agencies or agents.

The Court: That is a different thing. Really what you are looking for is the actual transcript, if that is available, and if not, the summary that the Captain talked about.

Mr. Williams: Yes.

The Court: However, of their conversations and not others, not the conversations of other people [270] except the person to whom either Costello or his wife may have been talking to at the time of the interception.

Mr. Williams: I am not interested in what anyone said about him, only what he said to someone else and what someone else said to him, which would be an intercepted conversation to which he was a party.

The Court: I understand that now.

Are you able to say now whether or not it is possible to cull out these things?

Mr. Scotti: It is very possible to gather the transcripts or plant cards reflecting a summary—

The Court: It just occurs to me, really, I am talking in a vacuum here, and what I am going to do, I hope it is the proper way to do it—if it is not, I suppose, Mr. Williams, you will find a way of getting some court to tell me it is improper—but I am going to announce now that I am going to sit down with Mr. Scotti, and, I take it, neither Mr. Scotti nor the District Attorney has any objection to letting me

ook at them with him, to see if I can find a way to require compliance with your subpoena.

Mr. Williams: All right.

The Court: Do you object to me looking at [271] them in the first instance for that purpose?

Mr. Williams: I certainly do not object to your looking at them at any time, your Honor.

The Court: That is the way we will do it. We will arrange some time when that can be done, but not at the moment. You will go ahead with something else.

Mr. Williams: That presents the problem to us, your Honor, because these are the records that we need for purposes of interrogation of the next line of witnesses we are calling.

The Court. Very well. We will go to work right now, we will adjourn now and we will tentatively resume at 2.15, if we can have reached our decision and had our lunch in that time. It might have to go a little beyond that but we will set 2.15 as the time. In the meantime, I will talk to Mr. Scotti.

Mr. Christy: Your Honor, of course I would consent to the Court looking at these records.

The Court: Then we have agreement.

Mr. Christy: May we point out to the Court that even assuming—

The Court: I know your point.

Mr. Christy: I make a continuing point on

[272] The Court: I used to be as young as you once and I could do two things at once, but now I have to do these things one at a time. Let me do this part first and then I will come to the other one, and I haven't the slightest doubt you will bring up the legal problem to me at the proper time.

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Colloquy

[294] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. 141-9

UNITED STATES OF AMERICA,

vs.

FRANK COSTELLO,

Defendant.

Before:

HON. JOHN F. X. McGOHEY,
District Judge.

New York, N. Y.
October 7, 1957,
10.30 o'clock a. m.

Appearances:

PAUL W. WILLIAMS, ESQ., United States Attorney, for the Government; By ARTHUR H. CHRISTY, ESQ., and JEROME J. LONDIN, ESQ., Assistant United States Attorneys.

HAYS, ST. JOHN, ABRAMSON & HEILBRON, ESQS., MORRIS SHILENSKY, ESQ., of Counsel, and EDWARD BENNETT WILLIAMS, ESQ., and THOMAS A. WADDEN, ESQ., Attorneys for Defendant.

Colloquy

[295] (The following took place in the robing room:)

The Court: Let the record show that this conference is being held at the request of Mr. Christy in the robing room.

Mr. Christy: Your Honor, I had an agreement with Mr. Williams to produce at the hearing the government agents who were still in the employ of the Government, and I just wanted to advise the Court that Mr. McElligott, John McElligott, who is one of those agents, is sick and will not be able to be here today.

Mr. McIntyre is also one of those agents and has suddenly had to go up to New Rochelle this morning but I expect that he will be available either later this afternoon or some time—some time later this morning or some time this afternoon; and Mr. Sohn is in New York and he can be here on 25 minutes' notice.

The Court: What about the other man who is ill? What is the prospect for his availability?

Mr. Christy: Which one is that?

The Court: McElligott.

Mr. Christy: I don't know. I hope that he will be in later this week.

[296] I might also say that Mr. Ruskin, who has been assisting me in this case, suddenly came down with the Asian flu last night.

The Court: Tell him to stay away.

Mr. Christy: As soon as I find out when Mr. McElligott will be available I will advise Mr. Williams.

The Court: Fine.

Mr. Williams: While we are here I might say to your Honor that in the normal course of events we had expected to call witness Thomas Fay first this morning, who is the chief investigator in Mr. Hogan's office, but unfortunately he had a death in his family and he can't be here today because he must attend a funeral.

However, I have made arrangements with Mr. Scotti to have his immediate assistant come, so that while we can identify the records that are necessary to be identified so that we may go forward, I won't be able to ask Mr. Fay certain questions that I would like to have asked him had he been here with the records and I will call him as soon as he is available.

The Court: All right.

Mr. Williams: That is the reason why he [296a] wasn't here at 10:30. I was concerned when I didn't see him, but they are sending, I understand, Mr. Scanlon and Mr. Shipsey here with the records so that we will be able to go forward with that phase of the case.

The Court: All right.

[297] (The following proceedings took place in the courtroom:)

Mr. Williams: Your Honor, may we have a rule excluding witnesses who are to testify.

The Court: Yes. If there are any men in the courtroom who are under subpoena, who are by any other method of communication or known to be prospective witnesses, they will withdraw to the witness room. That of course does not include the two agents who are assisting you.

Mr. Christy: That is right, Mr. Murphy and Mr. Leath.

The Court: Those are the gentlemen who sat with you when you initiated these hearings back in June.

Mr. Christy: Yes.

Mr. Williams: I might say, your Honor, that I have to call Mr. Wadden to the stand to identify certain records and I assume there is no objection to his sitting here as counsel.

The Court: No.

Mr. Williams: Your Honor, in the absence of Mr. Fay whose unavailability I explained in the robing room, I would like to call first of all Lieutenant [298] Shipsey from the District Attorney's office.

Willard Shipsey—for Defendant—Direct

WILLARD SHIPSEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Witness: I am from the District Attorney's office, New York County.

Direct examination by Mr. Williams:

Q. Lieutenant Shipsey, would you state your full name for the record? A. Willard Shipsey.

Q. Where do you reside? A. 136-70 71st Road, Flushing.

Q. What is your occupation at the present time? A. I am a lieutenant assigned to the New York City Police Department, District Attorney Squad.

Q. How long have you been a member of the New York City Police Department? A. Since 1936.

Q. How long have you been assigned to the New York County District Attorney's office? A. With the exception of a period of about two years, 18 years.

Q. Now, is your immediate superior Mr. Fay, [299] Mr. Thomas Fay? A. No, sir, he is not.

Q. Who is your superior? A. My superior is Captain Haines.

Q. Is Captain Haines assigned to the investigative squad under Mr. Fay? A. No, Mr. Williams. Captain Haines is head of the police unit in the District Attorney's office. Mr. Fay is the chief investigator.

Q. Now, have you responded on behalf of the District Attorney's office to a subpoena served upon him calling upon him to produce certain records in this case? A. Yes.

Q. And do you have those records here with you? A. I do.

Q. Have you brought with you a transcription of the telephone conversations emanating over the line Trafalgar 4-2325 in New York? A. Yes.

The Court: What is that number?

Mr. Williams: Trafalgar 4-2325.

Q. Is that a telephone number which is assigned to the defendant in this case Frank Costello?

[300] Mr. Christy: Your Honor, I think there is also—

A. There seems to be a little discrepancy here. There are two telephone numbers.

Q. Well, I am going to come to both of them. What are the two numbers? A. 4303 I believe and 4325.

Q. 4-2325 is a later number assigned to the Costello residence? A. Yes.

The Court: I am not clear. You first asked do you have transcriptions of conversations over the telephone listed as Trafalgar 4-2325. Do you have those?

The Witness: Could I examine the transcripts, your Honor?

The Court: Yes.

The Witness: Trafalgar 4-2325.

Q. What is the other number for which you have transcribed telephone conversations? A. Trafalgar 4-3403.

Q. Trafalgar 4-3403? A. Yes.

Q. Is that a telephone number which was assigned [301] to the defendant in this case, Mr. Costello? A. Yes, sir.

Q. So you have conversations from two numbers, both of which numbers were assigned to the defendant Costello? A. That is right.

Q. And all of these transcriptions were transcriptions of conversations that went over one of these two telephone numbers? A. That is right.

Q. Is that correct? A. Yes.

Q. Were both of these telephone numbers at the same address at different times? A. Yes.

Q. And those telephones were at 115 Central Park West, New York City, is that correct? A. That is right.

Q. Now, have you brought in response to the subpoena which was served upon Mr. Hogan's office other records kept of those conversations? A. I have brought the index to the plant cards.

Q. The index to the plant cards, is that correct? A. Yes.

[302] Q. Would you show us those? A. (Witness indicates.)

Q. Now, would you explain to us, Lieutenant, what relationship these plant cards have to the transcriptions? A. When a telephone message was received and written up on the sheets, that is, transcribed, all names, telephone numbers were then put on the plant card which was filed either alphabetically or numerically according to telephone numbers called.

Q. In other words, do you have an index card for every transcribed phone conversation? A. Yes.

Q. Bearing the name of the party calling or called from either Trafalgar 4 2325 or the other number you indicated? A. That is right.

[303] Q. Now, in addition to showing the number of the person called or calling, do those cards purport to give a synopsis of the conversation? A. They do.

Q. So that theoretically there should be a plant card for each of the conversations which were intercepted; is that correct? A. Unless it was a very insignificant message.

Q. Do I understand you correctly that only messages that were regarded as having some significance were synopsized on these plant cards? A. Yes.

Q. And who would make the determination of the significance of the message? A. Generally the detective that was assigned to the plant.

Q. When were the plant cards prepared in relationship to the time of the actual interception? A. Shortly after the message was intercepted.

Q. By that do you mean, Lieutenant, the same day? A. The same day, yes.

Q. Now, have you produced, Lieutenant Shipsey, conversations which were transcribed in which the defendant Costello was a participant where the conversation [304] was not held over either of the numbers which we have previously indicated? A. No, I don't have those with me at this time, Mr. Williams.

Q. Where are they now? A. I think they are with Mr. Fay.

Q. They are with Mr. Fay. Well, have you produced here, Lieutenant, the custodial records of the District Attorney's Office showing who has had access to these transcriptions and these plant cards? A. No. That is in the possession of Mr. Fay also.

Q. Then the only thing that you have here at the moment are the actual transcriptions of the interceptions over the two indicated numbers and the plant cards in relation to these transcriptions; is that correct? A. That's right.

Q. Are they records kept in the regular course of the business of the District Attorney of New York County? A. Yes.

Mr. Williams: Your Honor, I think that is perhaps as far as I can go with Lieutenant Shipsey. I [305] of course had some further questions for Mr. Fay, but they can wait.

The Court: Very well.

Mr. Williams: May we have those records identified? I think it would be sufficient if we simply identified the transcriptions as Defendant's Exhibit No. 1 and the plant cards as Defendant's No. 2, unless there are already exhibits.

The Court: One exhibit has been marked; statement of Costello, A for identification.

Mr. Williams: Make this B. It is B for identification at this point.

The Court: If you have more than one envelope you had better mark them B-1, B-2. We ought to have some identification of what is in each jacket also.

Why not let Mr. Williams take these and find out what each contains and we will mark it.

By Mr. Williams:

Q. Will you pull out, first of all, Lieutenant, the 1943 taps?

(Witness complies.)

Mr. Williams: May we have these marked Defendant's Exhibit B-1, Lieutenant.

The Court: For identification?

[306] Mr. Williams: For identification at this point.

(Marked Defendant's Exhibit B-1 for identification.)

The Court: What is that?

Mr. Williams: 1943 intercepted conversations of the defendant Costello and his wife, your Honor.

The Court: These are the actual transcriptions?

Mr. Williams: Yes, your Honor.

By Mr. Williams:

Q. Now, do you have an envelope, Lieutenant Shipsey, containing intereeptions in the year 1946? A. I do.

Mr. Williams: May we have this envelope marked, Mr. Clerk, Defendant's No. B-2 for identification?

(Marked Defendant's Exhibit B-2 for identification.)

Q. Do you have an envelope there, Lieutenant, for transcriptions of Costello conversations in 1950 and 1951? A. I do (handing).

[307] Q. Are they all in one? A. From 9/20/50 to 2/28/51.

Mr. Williams: May we have this jacket which purports to contain intercepted conversations of the defendant Costello over his telephone Trafalgar 4-2325 from 9/20/50 to 2/28/51 marked Defendant's No. B-3 for identification?

(Marked Defendant's Exhibit B-3 for identification.)

The Court: What was that date in 1951?

Mr. Williams: February 28, 1951, your Honor.

By Mr. Williams:

Q. Do you have an envelope, Lieutenant, which carries these conversations forward from March 1, 1951? A. Yes.

Q. How far does this particular envelope go? A. June 5, 1951.

Mr. Williams: May we have this envelope which purports to contain telephone conversations intercepted over Trafalgar 4-2325 from March 1, 1951, to

June 5, 1951, marked as Defendant's No. B-4 for identification?

(Marked Defendant's Exhibit B-4 for identi-
[308] fication.)

By Mr. Williams:

Q. Do you have another envelope carrying that chronologically forward, Lieutenant? A. Yes (handing).

Mr. Williams: May we have this envelope which purports to contain transcribed conversations intercepted over Trafalgar 4-2325 from June 6, 1951, to August 30, 1951, marked as Defendant's Exhibit B-5 for identification?

(Marked Defendant's Exhibit B-5 for identification.)

Mr. Williams: May we have this envelope which purports to contain conversations intercepted over Trafalgar 4-2325 from August 31, 1951, to March 28, 1952, marked as Defendant's No. B-6 for identification?

(Marked Defendant's Exhibit B-6 for identification.)

Mr. Williams: And may we have this envelope which purports to contain telephone conversations intercepted over Trafalgar 4-2325 from April 1, 1952, to April 15, 1952, marked as Defendant's Exhibit B-7 for identification?

[309] (Marked Defendant's Exhibit B-7 for identification.)

By Mr. Williams:

Q. Now, Lieutenant Shipsey, would you do the same for me with respect to the plant cards, sir?

The Court: These you had better mark a C series.

Q. Would you give me the packet of plant cards that come first in chronological sequence?

The Court: B-1 purports to be the transcriptions for the year 1943.

Mr. Williams: Yes.

The Court: Do you have plant cards for that period, that is, plant cards that correspond to the transcriptions which have gone in as B-1 for identification?

The Witness: Yes, sir.

The Court: Do you have a rubber band that you can wrap them all in one batch with?

Mr. Williams: May we have this packet of plant card which purports to be the plant cards for the intercepted calls over the Costello line in the year 1943 marked as Defendant's C-1 for identification?

[310] (Marked Defendant's Exhibit C-1 for identification.)

Q. Now, Lieutenant, do you have a packet of cards for 1946? A. I do (handing).

Mr. Williams: May we have this packet of plant cards which purports to be the index cards for the telephone calls intercepted over the Costello line in 1946 marked as Defendant's No. C-2 for identification.)

(Marked Defendant's Exhibit C-2 for identification.)

Q. And I ask you now if you have, Lieutenant, a packet of cards for the years 1950, 1951, 1952? A. I do (handing).

Mr. Williams: May we have this packet of plant cards which purports to be the index of transcribed telephone calls intercepted over the Costello line in 1950, 1951 and 1952 marked as Defendant's Exhibit No. C-3 for identification?

(Marked Defendant's Exhibit C-3 for identification.)

Q. Now, Lieutenant Shipsey, are these the records which were examined in your office during the [311] week of August 26 running for a period of eight or nine days by Mr. Wadden? A. Yes, sir.

Q. You were there present at all times when he inspected those records? A. Yes, sir.

Q. And that inspection lasted over a period of eight or nine days; is that correct? A. About that, sir.

Q. And Mr. Fuller was also present, was he not? A. Yes, sir.

The Court: Who is Mr. Fuller?

Mr. Williams: Mr. Fuller is an associate of mine, as is Mr. Wadden.

Q. And you were so introduced to them; is that correct? A. That is correct.

Q. There were also present representatives of the Bureau of Internal Revenue at this time, were there not? A. On the second day they appeared.

Q. And they remained throughout the inspection? A. That's right.

Q. Do you recall who they were, sir? A. Mr. Ayers and Mr. Mischel.

[312] Q. And they were special agents? A. Special agents.

Q. With the Bureau of Internal Revenue? A. Treasury Department.

Mr. Williams: Your Honor, that is as far as I can go with Lieutenant Shipsey.

Mr. Christy: May I ask a couple of questions?

Cross-examination by Mr. Christy:

Q. Lieutenant, do you have any records with you or are you able to tell from the records which you have brought the exact days when the taps were installed on Costello's telephone? A. Yes, sir.

Q. Would you give us the dates when the tap was installed in the year 1943, when it began and when it was taken off? A. Could I examine—

The Court: Pardon me just a moment. And the telephone number.

A. Could I examine the plant cards, please?

(Handed to witness by Mr. Christy.)

A. This plant was opened on May 7, 1943, on telephone number Trafalgar 4-3403.

[312a] *By the Court:*

Q. 3403? A. Yes, sir.

Q. Where was that located? A. 115 Central Park West.

[313] Q. Will you tell us when that was discontinued, if it was?

The Court: That was your question, was it not?
Mr. Christy: Yes, your Honor, it was.

A. The last date appears to be November 5, 1943.

Q. And it was maintained constantly throughout the period? A. Yes, sir, with the exception of Sundays and holidays.

Q. Well, it wasn't taken off on those days? A. No.

Q. What you mean by that is that it wasn't monitored on those days? A. Not monitored.

Q. What was the date it was maintained until? When? A. November 5, 1943.

The Court: All right.

By Mr. Christy:

Q. Lieutenant, can you tell us when the next tap was installed on Costello's telephone and for how long that tap lasted? A. Could I examine the 1946 plant cards?

[314] The Court: Yes.

Q. Yes. A. This plant was opened June 11, 1946 on Trafalgar 4-3403.

By the Court:

Q. 3403? The same phone? A. Yes.

Q. Same number? A. Same number.

Q. Same address of course? A. Same address, 115 Central Park West, and it was removed on September 10, 1946.

Q. Is it a fact then that so far as the records which you have here are concerned that there was no tap on the phone

Trafalgar 4-3403 between the period November 5, 1943 to June 11, 1946? A. True?

The Court: Very well.

By Mr. Christy:

Q. Lieutenant, will you tell us when the next tap was installed on Costello's telephone and for how long that tap lasted? A. The plant was put in September 20, 1950.

[315] *By the Court:*

Q. September 20, 1950? A. Yes, sir, on Trafalgar 4-2325.

Q. 32 or 23? A. 2325.

Q. Same address, 115 Central Park West? A. Yes, sir.

The Court: All right.

The Witness: The last date of the plant, March 28, 1952.

By Mr. Christy:

Q. Would you check your records again, Lieutenant? I think you identified a folder which ran beyond March of 1952. B-7, I believe.

The Court: B-7 was from April 1 to April 15.

The Witness: I am sorry. 4 15 52.

The Court: Well, what you mean is that the tap which was installed on September 20, 1950 on Trafalgar 4-2325 was continued until April 15, 1952?

The Witness: That is right.

Willard Shipsey—for Defendant—Redirect

By Mr. Christy:

Q. Lieutenant, from the period May 7, 1943 which was the date of the first tap until April 15, 1952, the only taps installed on Costello's telephone were [316] the ones which you have identified? A. Yes, sir.

Q. The only ones installed by the District Attorney's office? A. That is right.

Q. Lieutenant, no member of the Treasury Department has ever seen any of these records which you have produced in court this morning to your knowledge, has he? A. With the exception of Mr. Ayers and Mr. Mischel.

Q. Prior to 1954 no member of the Treasury Department ever saw any of these records which you have produced in court this morning to your knowledge? A. Not that I know of.

Mr. Christy: No further questions.

Redirect examination by Mr. Williams:

Q. Lieutenant, I don't know whether you can clear this up for us or not—

The Court: Would you wait a moment, Mr. Williams?

Mr. Williams: Mr. Clerk, would you please mark this Defendant's Exhibit D for identification.

[317] (Marked Defendant's Exhibit D for identification.)

By Mr. Williams:

Q. I am going to hand you, Lieutenant, what purports to be an order authorizing the intereception of phone calls at Trafalgar 4-2325 and ask you if this refreshes your

recollection that the conversations of the defendant Costello were intercepted after April of 1952. I call your mind specifically to the date of the signing of the order which was to run for six months and the date of the termination of the interception. A. I would have no knowledge of this, Mr. Williams, because at that period of time I was out of the office.

Q. Well, ordinarily when you secured an order it ran for six months, did it not? A. Generally, yes.

Q. Can you say when this order was procured? A. It was signed on March 7, 1952.

Q. And you have seen a number of these orders and the records that go with them, have you not? A. Yes, sir.

Q. And when does it show that this plant was [318] taken off?

The Court: Well, would the order show that?

Mr. Williams: The record adjacent to the order does, your Honor, the cancellation ticket.

Q. I have in mind this record here (indicating).

Mr. Christy: Your Honor, as I understand he is asking the Lieutenant if his recollection is refreshed as to the date that it was taken off.

Mr. Williams: I am asking him—

The Court: I don't think that is what he asked but what difference does it make.

Have you produced this record, Lieutenant?

Mr. Williams: No. These are telephone company records, your Honor.

The Court: Oh. The point you want to get at is whether he knows that the tap authorized by that order was discontinued on a certain date, isn't that it?

Mr. Williams: Yes, sir.

The Court: What is the date of it?

Mr. Williams: 11/6/52.

The Witness: The date of cancellation.

The Court: The question is do you know anything about that from your work in the office.

[319] The Witness: No, sir. As I explained—

The Court: You were out of the office?

The Witness: I was out of the office at that time.

Recross examination by Mr. Christy:

Q. As far as you know, Lieutenant, the last day on which Costello's phone was tapped in 1952 was April 15th? A. That is right, sir.

Mr. Christy: No further questions.

By Mr. Williams:

Q. Lieutenant, Mr. Christy asked you if to your knowledge members of the Internal Revenue had access to these records. I want to ask you if you have knowledge that members of the United States Attorney's office had access to these records? A. I have no knowledge of that.

Q. You have no knowledge? A. No.

Mr. Williams: That is all with this witness.

By the Court:

Q. Lieutenant, would you tell me the two years you were not working in the DA's office on this business? A. 1951 to 1953.

[319-A] The Court: Any further questions?

Mr. Williams: No, your Honor.

Thomas A. Wadden—for Defendant—Direct

[320] THOMAS A. WADDEN, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Wadden? A. 3432 34th Street N. W., Washington, D. C.

Q. Are you a member of the District of Columbia bar, sir? A. I have been a member of the District of Columbia bar for a little over eight years, sir.

Q. And you are associated with me in the practice of law in the District of Columbia? A. That is correct, sir.

Q. Mr. Wadden, directing your attention to the exhibits which have been marked for identification Defendant's Exhibits B and C, have you heretofore seen those documents? A. I have, sir.

Q. When did you first see them? A. I first saw them on August 26th of this year.

Q. Have you personally examined all of those documents? A. I have, sir.

Q. Now, directing your attention, first of all, [321] to the exhibit marked Defendant's B for identification, what are they, sir? A. Those are actual transcriptions of messages intercepted on telephones which were listed to Mr. Costello.

Q. And what did you find to be contained in C? A. C represents cards called plant cards, which are summaries of the transcriptions contained in the Exhibit B.

Q. Now will you tell the Court, sir, what your purpose was in examining the transcriptions and the plant cards? A. My purpose in examining—

Mr. Christy: Objection, your Honor.

The Court: Sustained. Let him tell us what he found. What difference does it make what his purpose was.

Thomas A. Wadden—for Defendant—Direct

Mr. Williams: I simply want to lay what he was looking for.

The Court: Can there be any doubt about it in view of what happened when we had the hearings originally? He went there to look to see whether or not there was anything in there that was used for this income tax prosecution. We all understand [322] that.

By Mr. Williams:

Q. Did you find any phone transcriptions, any telephone transcriptions, over the telephone lines Trafalgar 4-2325 or Trafalgar 4-3403 to either witnesses who testified in the tax case or to companies for which expenditures were listed in this tax case by the defendant?

Mr. Christy: Just a minute. Your Honor, I object to any testimony along these lines on the grounds which I have stated before, that whether or not there is any information in these wiretaps which may have been used in the income tax case against Costello, it is academic under the recent decisions of the Circuit Court, the Benanti decision and the Costello decision. That is with regard to all of the taps, the ones in 1943, 1946 and 1952.

I would have a further objection to any testimony which would relate to the last tap, the one that ran from 1950 through 1952, through April 15, 1952, on the grounds that there has been no testimony in the record so far which would indicate that any information from these later taps had ever been given to the Treasury Department or to the Internal Revenue [323] Bureau.

The Court: Your objection is overruled.

By Mr. Williams:

Q. Do you recall my last question? A. No. Would you have the reporter read it.

> Mr. Williams: Would you read it back, please? (Question read.)

A. I did, sir.

Q. Would you tell us, directing your attention, first of all, to the Airflow Refrigeration Company, whether or not you found a transcription of a conversation over the Costello wire to that company? A. I did.

Q. Would you tell us the date of that telephone call? A. July 31, 1951.

Q. And between what persons was that conversation? A. This conversation was between Mrs. Costello and an unidentified person at the Airflow Refrigeration, Inc.

Q. Would you tell us, sir—

> The Court: Just a minute. Was there [324] testimony with respect to that at the trial?
>
> Mr. Williams: I am just about to bring that out, your Honor.

Q. Was there testimony with respect to an expenditure to the Airflow Refrigeration Company at the trial? A. There was—

> Mr. Christy: Your Honor, I object again. Perhaps I can elaborate on my objection that I entered a minute ago with regard to the taps in 1951 and 1952.
>
> Your Honor will recall that there was some argument at the hearing before it was adjourned in June with regard to these taps and the Government ob-

jected on the grounds that there had been no connection between the taps and anybody in the Government. The Government was overruled. There apparently was some evidence that Mellin had talked to Graefnecker and Mellin had indicated that he might have seen some of these taps, but your Honor will recall that Mr. Mellin resigned from the Treasury in 1949. Therefore, of course, he could not have had access to any of the taps after the 1946 taps, and I don't recall that there was any testimony which would indicate that the Treasury [325] Department had access to these taps after Mr. Mellin had left. I think that Mr. Graefnecker had testified that he may have seen a man named Cordes on one or two occasions, but my recollection is that he was unable to recall ever giving any wiretap information to Cordes or to any Treasury agent.

Mr. Williams: Your Honor, I think Mr. Christy is mistaken about that. The record at page 189 shows that Mr. Graefnecker testified that he gave information continuously to Bureau of Internal Revenue agents until the time of his retirement, which was in 1954.

Mr. Christy: Page 189. Whereabouts?

The Court: He didn't specify what information he gave. My recollection of the testimony was whenever anybody came in from a governmental bureau, whether Treasury or not, if he had information, he made it available and expected the same and got the same cooperation from them.

In any event, it may very well be, Mr. Christy, as you say, that these bits of information never came into the possession of the Treasury agents. Of course, that is the crucial thing in the case, whether they did or not. I say it is crucial whether

[326] they did or not and even more crucial whether or not they were done at the instigation and active participation of Treasury agents, but I think it is much safer and fairer to the Government and to the defendant to let us have exactly what he claims here and I am going to let him put this testimony in. So I will overrule your objection.

Mr. Christy: Very well, your Honor.

By Mr. Williams:

Q. I think my last question, Mr. Wadden, was what expenditure actually went into the record of the trial in this case to Airflow Refrigeration. A. The expenditure was $120.61 in the year of 1949 as evidenced by the record at page 1084.

The Court: What was that again?

The Witness: $120.61, your Honor.

The Court: What year?

The Witness: 1949, sir.

The Court: And the record citation is what?

The Witness: Page 1084, your Honor. The witness was James Kelly.

The Court: All right.

Q. In your examination of the transcribed telephone [327] conversations, did you find any between the Costellos and B. Altman, Inc., a New York department store? A. Yes, sir, I did, on November 3, 1950.

Q. And do you recall between whom that conversation took place? A. The conversation was between Mrs. Costello and an unidentified employee at B. Altman & Company. The employee called Mrs. Costello concerning the delivery of a package to Mrs. Costello.

Thomas A. Wadden—for Defendant—Direct

Q. Were there expenditures proven at the trial to B. Altman, Inc.? A. There were. In 1948 there was an expenditure proved of $727.96. In 1949, there was an expenditure proved of $208.70.

Q. What was the total of the expenditures proven to this particular company? A. $936.66.

Q. Would you tell us through what witness that was proven and at what page in the record that testimony appears? A. It was proven by Frank W. Shimper, and the record page is 608.

Q. When you referred to the record page, are you [328] talking about the printed record on appeal, so that we will have that clear? A. That is correct.

The Court: Not the transcript?

Mr. Williams: No.

The Court: All right.

By Mr. Williams:

Q. In your examination of the transcriptions, did you find any conversation to the Bayview Market? A. I did, sir, on May 3, 1951. Mrs. Costello placed an order at the Bayview Market for weekend grocery supplies.

Q. Were there expenditures proven at the trial to the Bayview Market? A. There were. In 1947, $700; in 1948, $700; and in 1949, $700, for a total of $2,100.

Q. And through what witness was that proven? A. William T. Gregorius.

Q. And at what page in the appeal record does that appear? A. At page 1200.

Mr. Williams: Your Honor, I can readily translate the record page for your Honor to the actual transcript at the trial.

Thomas A. Wadden—for Defendant—Direct

[329] The Court: I think that won't be necessary. If it becomes necessary, I am sure there will be a copy of the printed record made available to me, if that is important.

By Mr. Williams:

Q. Now, Mr. Wadden, did you find any telephone conversations between the persons at the Costello residence and Bloomingdale's Department Store in New York? A. I did, sir. There were three telephone calls. The first was on October 16, 1943. An unidentified employee of Bloomingdale's called Mrs. Costello. The second was on July 17, 1946. Mrs. Costello called an unidentified saleslady requesting that an itemized statement of her account be sent to Mrs. Costello. On July 29, 1951, Mrs. Costello called a sales individual for the purpose of having an orange squeezer repaired.

Q. Now, were there expenditures proven from the Costellos to this company at this trial? A. There were. In 1946, $80.11; in 1947, $670.83; in 1948, $677.10; in 1949, $249.83, for a total of $1,677.87.

The Court: Pardon me just a minute. Let [330] me have that final total.

The Witness: $1,677.87, your Honor.

By Mr. Williams:

Q. Through what witness were these expenditures proven? A. These expenditures were proven by Lillian Baskian, at page 617 in the record.

Q. Did you find any telephone conversations between either of the Costellos and the New York department store Bonwit Teller or its employees? A. Yes, I did. There were four calls, the first being May 10, 1943. A woman, unidenti-

fied but apparently Mrs. Costello, called Bonwit Teller regarding a pair of shoes which had been ordered but not received.

On December 6, 1950, Mrs. Costello called a friend and asked her to meet Mrs. Costello for lunch at their regular place, Bonwit Teller's.

On January 17, 1951, Mrs. Costello again agreed to meet a friend at Bonwit Teller's, and on June 20, 1951 she again made a date with a friend to meet at Bonwit Teller's.

Q. Were there expenditures actually proven at the trial running from the Costellos to Bonwit Teller? [331] A. There were. In 1947, $205.21; in 1948, $304.90; in 1949, $185.80.

Q. What was the total? A. For a total of $695.10.

Q. Through what witness were those expenditures proven? A. These were proven through Anthony Maruggi, at page 603 in the record.

Q. Did you find any conversations over Trafalgar 4-2325 or Trafalgar 4-3403 to Brainson, Inc.? A. I did.

Q. Can you identify Brainson, Inc. for us? A. Brainson, Inc. is a tailor, if I am not mistaken.

Q. What calls did you find? A. On May 21, 1951, the Costello maid called an unidentified man at Brainson to ask if Mr. Costello's suits would be delivered that day. On April 30, 1951, there was a call from an unidentified person to Mr. Costello to arrange a meeting at Brainson's.

[332] Q. Now, did a witness testify at the trial from Brainson, Incorporated? A. Mr. Leonard Brainson testified at page 701 of the record.

Q. What expenditures were proven running from the defendant Costello to Brainson, Incorporated? A. 1946, $887.58.

In 1947, $953.70.

In 1948, $969.

In 1949, $2152.40, which represents a total of $4,962.68.

Thomas A. Wadden—for Defendant—Direct

Q. Is the telephone number of Braimson reflected in the transcribed messages? A. Yes, sir. It is Murray Hill 5-9490.

Q. Is that true of all these conversations that we are talking about? Is the telephone number reflected of the company called? A. That is correct, sir.

Q. Now, did you find any intercepted telephone conversations from Trafalgar 4-2325 or Trafalgar 4-3403 running to the Cadillac Motor Division, 521 West 57th Street? A. I did, sir.

Q. In what conversations were they? [333] A. On May 17, 1943 Mr. Ross of the Cadillac Motor Division called Estelle Brown who was the Costello maid and left with her an estimate on a car on May 19, 1943. The maid called Mr. Ross—

> The Court: What was the first date?
>
> The Witness: May 17, 1943.
>
> The Court: This date you are giving now is what?
>
> The Witness: May 19, 1943, the maid called Mr. Ross to ask him when the car would be ready.

Q. Now, were there expenditures shown to this particular company running from Costello? A. There were expenditures shown in 1941, 1942, 1948 and 1949.

Q. Would you tell us what the amounts of those are? A. In 1941, $1,298.24.

In 1942, $1,200.96—excuse me: $1,296.48.

In 1948, $145.72.

In 1949, $264.94.

Q. I am going to ask you, Mr. Wadden, if you will give us the total of the 1941 and 1942 expenses first, because they are outside the taxable years and were only used in the build-up of the net worth, and then [334] the total for 1948 and 1949. A. The 1941 to 1942 expenditures were $2,594.72.

In 1948 and 1949 is represented by $410.66.

Q. Now, did you find any conversations from Trafalgar 4-3403 or Trafalgar 4-2325 running to a company known as Hattie Carnegie? A. Yes, sir. On May 13, 1943 Mr. Davis of Hattie Carnegie made a call to the Costello apartment and left a message for Mrs. Costello to call him.

Q. Now, were there expenditures shown running from Costello to the Hattie Carnegie Company? A. There were expenditures shown in 1944, 1945 and 1946. In 1944 the total was $37.88.

In 1945 the total was $1,092.68, or a sub-total of $1130.56.

In 1946 during the taxable period in question, $37.88 was proven.

Q. Through what witnesses? I take it you mean was proven on the trial. A. They were proven through Ruth Smith at page 1116.

Q. Now I think with respect to the expenditure to the Cadillac Motor Division I failed to ask you through what witness that was proven? [335] A. That was proved through Mr. Edwin Gerhart at page 1078 of the record, and I also believe Mr. George Wolf testified concerning some transaction with Cadillac at page 988 of the record.

Q. Did you find any conversation over either of the two lines about which we are concerned running to the Corn Exchange Bank? A. Yes, sir, I did. On June 8, 1943 Mrs. Costello called the bank and requested a stop payment on a check of hers.

The Court: What date?

The Witness: June 8, 1943.

On June 1943 Mrs. Costello called the bank to ascertain her bank balance, presumably checking.

On September 15, 1943 George Wolf called the manager of the bank concerning a $17,000 check, for Mrs. Costello.

The Court: What was the date?

The Witness: September 15, 1943.

Thomas A. Wadden—for Defendant—Direct

Q. What was that conversation? A. George Wolf called the manager of the bank concerning a $17,000 check from Mrs. Costello. He wanted a certified check in exchange for cash.

Q. Now, was there a witness called from the [336] bank to show the existence of a safe deposit box there? Who was the witness called from the bank? A. The witness called was Mortimer Bogue

Q. At what page did he testify? A. At page 896.

Q. What expenditures to the bank were actually shown in the record? A. In 1943, $8.40.

In 1949, $8.40.

In 1945, $16.80, for a sub-total of $33.60. During the taxable year 1946, $16.80; 1947: $16.80.

1948, $20.40.

1949, $20.40, for a sub-total during the taxable period of $74.40.

The Court: All right. We will take a short recess.

Mr. Christy: Your Honor, may I take up one matter before you take the recess? I understand that Mr. Williams has subpoenaed quite a few people. I know there are some people from the Post Office here from Port Washington, New York. Perhaps we could work out some arrangement whereby these people would not have to stay around all day.

[337] The Court: I should think so.

Well, maybe you can check that now.

Mr. Williams: I will do the best I can for them. I don't want to tie them up, your Honor.

(Short recess.)

Mr. Williams: May I proceed, sir?

The Court: Yes.

Thomas A. Wadden—for Defendant—Direct

By Mr. Williams:

Q. Mr. Wadden, did you find any telephone conversations over the lines that we are interested in to Cyclax, Ltd., C-y-c-l-a-x? A. Yes, sir, I did. On November 16, 1950, Mrs. Costello called a friend, and the friend told Mrs. Costello that she, Mrs. Costello, had another facial treatment coming to her at Cyclax.

Q. Were there any expenditures proven in the record to Cyclax, Ltd.? A. In the year 1949, $43.16. This was put in the record by Lillian Mayle, M-a-y-l-e, at page 890.

Q. Did you find any telephone conversations over the lines in which we are interested to the G & K Garage? A. Yes, sir, I did. On July 8, 1951—strike that, please. On January 8, 1951, Mrs. Costello [338] called an unidentified man and ordered her car to be sent to her residence. On January 10, 1951, the same call was made.

On February 3, 1951, the same call was made.

On March 21, 1951, Mrs. Costello called an unidentified man to ask about the battery and if the car needed water.

On April 24, 1951, an unidentified woman called for the car.

On May 10, 1951, Mrs. Costello called an unidentified man and asked that the garage pick her car up which was double parked in front of her house.

On June 14, 1951, Mrs. Costello called for her car.

On July 12, 1951, an unidentified woman requested that the car be delivered to the residence.

On August 1, 1951, the same call was made.

On August 8, 1951, the same call was made.

On August 20, 1951, Mrs. Costello called an unidentified man and ordered the car picked up and washed.

On August 22, 1951, Mrs. Coste[illegible] called and asked for the car to be sent around.

Thomas A. Wadden—for Defendant—Direct

Q. Were any expenditures proven at the trial to [339] G & K Garage? A. In 1948, $54.37; in 1949, $639.42, for a total of $693.79.

Q. Through what witness were these expenditures proven? A. The witness was Rubin Kaplan, at page 598 of the record.

Q. Were there any conversations intercepted between Mr. Costello and his doctor, Dr. Gavin? A. There were, sir. On December 6—

The Court: What is the name of the doctor?

Mr. Williams: Dr. Gavin.

Q. What is the full name of the doctor? A. Dr. Charles Gavin.

Q. G-a-v-i-n? A. Yes.

Q. What is his address? A. Squibb Building at 58th and Fifth Avenue.

Q. In New York City? A. That's correct, sir.

Q. What interceptions were there of conversations between the defendant Costello and Dr. Gavin? A. On December 6, 1950, Dr. Gavin's nurse called Mrs. Costello to make an appointment for Mr. Costello.

[340] On February 28, 1951, Mr. Costello called Dr. Gavin's office for an appointment.

On March 8, 1951, Mr. Costello called Dr. Gavin to cancel an appointment because he had a virus.

On April 27, 1951, Dr. Gavin's office called Mr. Costello. Mr. Costello cancelled the appointment.

On December 12, 1951, Dr. Gavin's office called Mrs. Costello to arrange a dental appointment for Mr. Costello.

On December 17, 1951, Dr. Gavin's office called Mrs. Costello to verify a 9 o'clock appointment.

Q. Were there expenditures proven at the trial to Dr. Gavin? A. There were, sir; $285 in the year 1949.

Q. And who was the witness called? A. Dr. Charles Gavin, at page 1115 of the record.

Q. Now, were there any conversations intercepted between the defendant Costello and the law firm of Greenbaum, Wolff & Ernst? A. There were, sir.

Q. Who was the party to whom Mr. Costello talked when he called that number?

The Witness: Would you indulge me one [341] minute, please?

(Pause.)

A. He talked to Mr. Greenbaum. He also talked to a Mr. Harold Stern.

Q. Is that Mr. Edward S. Greenbaum of that firm? A. I believe it is, sir, yes, sir.

Q. Would you tell us what dates the conversations took place which were intercepted between Mr. Costello and Mr. Greenbaum? A. Well, on August 2, 1943, Mr. Costello called Mr. Greenbaum. Mr. Greenbaum was not there and he talked to Mr. Harold Stern relating to income tax for 1941 and Internal Revenue.

On August 4—

The Court: Just a moment.

A. On August 4, 1943, Mr. Greenbaum's office called trying to locate Mr. Costello.

The Court: Did you give the year?

The Witness: That was 1943, your Honor.

The Court: The first was 1943?

The Witness: Yes, sir.

The Court: You said the conversation related to Internal Revenue and income tax matters?

The Witness: Yes.

[342] The Court: For any particular year was the conversation?

The Witness: My notes reflect he talked to Harold Stern relating to income tax for 1941.

The Court: I see. All right.

A. (Continuing) On August 16, 1943, Mr. Costello called Mr. Greenbaum, who was not in.

On August 18, 1943, Mr. Costello called Mr. Greenbaum regarding Mr. Higgins and his going to the Attorney General's office.

On August 20, 1943, Mrs. Costello called Greenbaum attempting to locate him for Mr. Costello.

The Court: What is that date?

The Witness: August 20, 1943, your Honor.

A. (Continuing) On August 30, 1934, Mr. Greenbaum's office called Mr. Costello to make a date for that particular day.

Q. Who was the witness who testified from that firm? A. It was Mr. Edward S. Greenbaum, at page 1271 of the record.

Q. And did he testify to any expenditures by the defendant Costello? A. He did.

[343] Q. In what years did those expenditures take place and for what amounts? A. In 1939, $11,000, in 1940, $10,650; in 1941, $4,000; in 1944, $5,000, for a sub-total of $30,650 before the taxable years in question.

In 1946, $10,000, and in 1947, $15,000, for a sub-total of $25,000 for the taxable years in question.

Q. Did you find any telephone conversations which went over the lines in which we are interested to the Jack Tar Hotel in Hot Springs, Arkansas? A. Yes, sir. On October

9, 1950, a Mr. Mort Herman called Mrs. Costello at her residence. Mrs. Costello told him that Mr. Costello was at Jack Tar's in Hot Springs, Arkansas.

Q. Were there any—

The Court: What was that date?

The Witness: That was October 9, 1950, your Honor.

Q. Were there any expenditures shown running from the defendant Costello to the Jack Tar Hotel in Hot Springs? A. Yes, sir. In the year 1947, $545.88; in the year 1948, $1,407.59, for a total of $1,953.47. This [344] was put into the record by Hans Thomson at page 925.

Q. Were there any telephone conversations intercepted over the lines in which we are interested to Jay Thorpe, Inc. of New York? A. Yes, sir, there were. On October 12, 1950, Mrs. Costello called a Mrs. Allen at Jay Thorpe concerning some merchandise which she had bought.

Q. Were there expenditures shown to Jay Thorpe in the taxable years in question? A. In 1946, $82.08; in 1947, $602.23; in 1948, $328.49; in 1949, $290.55, for a total of $1,303.35.

Q. Through what witness were those expenditures proven? A. Through Catherine Hannon, H-a-n-n-o-n, at page 623 of the record.

Q. Were there any intercepted telephone conversations running to a company known as Georg Jensen, Inc. of New York City? A. Yes, sir, there were. On November 10, 1950, an unidentified woman called Mrs. Costello and they arranged to purchase a wedding present at Jensen's.

Q. Were there any expenditures shown at the trial in this case to Georg Jensen? A. $20 in the year 1949.

[345] Q. Through what witness was that expenditure shown A. Margaret McCourt, at page 614 of the record

Thomas A. Wadden—for Defendant—Direct

Q. Were there any intercepted conversations between persons at the numbers with which we are concerned and a company known as D. Kalfaian & Son? A. Yes, there were.

Q. Where is D. Kalfaian & Son? A. That is located at 342 Livingston Avenue, New York City.

Q. And what were the dates of the interceptions? A. On October 4, 1943, Mrs. Costello called that firm concerning the storage of rugs.

On October 15, 1943, Mrs. Costello called about a bill received and about the storage of broadloom rugs.

Q. Were any expenditures proven at the trial of this case to D. Kalfaian & Son? A. Yes, there were. In 1938, $110.98; in 1939, $125.98; in 1940, $125.98; in 1941, $135.98; 1942, $149.66; 1943, $160.78; 1944, $156.30; 1945, $170.90, for a sub-total of $1,136.56 in the years before the taxable years in question.

In 1946, $202.40; in 1947, $207.10; in 1948, [345a] $203.94; in 1949, $16.80, for a total of $630.24 during the taxable years in question.

[346] Q. Through what witness were these expenditures proved? A. Mr. Maksoud Kalfaian.

Q. What page of the record did he testify? A. 682.

Q. Now, were there any intercepted conversations between the defendant Costello and, at the time, his doctor, John Lore? A. Yes, there were.

On June 11, 1943 Mr. Sorrentino called Frank Costello to ask the name of his doctor. Mr. Costello said it was Dr. Lore.

On December 16, 1950 Mrs. Costello called Dr. Lore's office and made an appointment.

The Court: How do you spell that name?

The Witness: L-o-r-e, your Honor. Dr. John Lore.

Thomas A. Wadden—for Defendant—Direct

Q. Now, were expenditures proven at the trial running from the defendant Costello to Dr. Lore? A. Yes, there were.

Q. Dr. Lore was dead at the time of the trial? A. That is correct, sir.

Q. Through what witness were those expenditures proven? [347] A. Dr. Benson Panettiere.

Q. At what page of the record? A. 1257.

Q. What expenditures were proven? A. In 1940, $25; in 1942, $190; in 1945, $30; for a sub-total of $245.

In 1946, $10; in 1947, $160; in 1949, $120; for a sub-total of $290 during the taxable period in question.

Q. Were there any interceptions over the lines in question of conversations running to persons at R. H. Macy, a department store in New York City? A. Yes, there were. On June 21, 1943 Mrs. Costello called the paint department of Macy's.

On July 1943 Mrs. Costello ordered a Venetian blind cleaner.

On July 16, 1943 Mrs. Costello ordered a walnut tray.

On July 20, 1943 Mrs. Costello ordered cigarettes and soap.

On September 29, 1943, Mrs. Costello called an unidentified person regarding meeting and shopping at Macy's.

On June 13, 1943, Mrs. Costello ordered a [348] hammock with stand.

On June 26, 1946 an unidentified person called Estelle, who was the maid. She asked for Mrs. Costello and was told she had gone to Macy's.

On November 27, 1951 Mrs. Costello called an unidentified person and ordered vitamins for her sister.

On June 21, 1952 Mrs. Costello called an unidentified person and ordered mouthwash sent to her.

Q. Now, did a witness testify at the trial to expenditures made to Macy's? A. A Miss Libby Todel at page 660 of the record.

Q. What expenditures were testified to running to Macy's department store? A. $202.17.

In 1946, $990.58.

In 1947, $888.31.

In 1948, $424.55.

In 1949, $886.30; for a sub-total during the taxable period of $2,989.74.

Q. Were there intercepted calls over the phone in question running to the Majestic Food Market? A. Yes, there were.

On June 15, 1946 Mrs. Costello called a [349] clerk to order certain cakes.

> The Court: What year was that?
>
> The Witness: June 15, 1946, your Honor.
>
> On June 20, 1946 the maid called and ordered groceries and vegetables.
>
> On June 25, 1946 the maid called and ordered groceries and vegetables.

Q. May I stop you, Mr. Wadden? Did the maid identify herself in these calls? A. I would have to answer that from memory, Mr. Williams. There are times when she identified herself. There are times when the person who took down the transcriptions identified her as the maid, and other times by her regular name. I can't tell by examining my records. The maid in this case was Estelle Brown.

On July 2, 1946 Mrs. Costello called and ordered the groceries and meat.

On July 11, 1946 Mrs. Costello called and ordered groceries and vegetables.

On July 30, 1946 Mrs. Costello called a vegetable man and ordered fruits and vegetables.

On January 1, 1951 the maid called and ordered food supplies.

Thomas A. Wadden—for Defendant—Direct

[350] Your Honor, may I clarify what I testified to?

On June 20, 1946 and June 25th call in 1946 which I have already testified to, the maid is identified as Estelle Brown.

Q. Now, were there expenditures shown running to the Majestic Food Market at the trial? A. Yes, sir. They were testified to by Jack Dershansky at page 1204 of the record. The expenditure proven was for the year 1949 in the sum of $347.93.

Q. Now, were there intercepted calls running from the numbers which we are interested in to the Majestic Meat Market at 250 Columbus Avenue? A. There were a number of these calls.

On May 13, 1943 the maid ordered vegetables.

On May 14, 1943 the maid ordered four lamb shanks and a four-pound chicken.

On May 18, 1943 the maid ordered vegetables.

On May 20, 1943, the maid ordered groceries, two lamb chops and a chicken.

On May 27, 1943, the maid ordered food.

On June 3, 1943, the maid ordered food.

On June 4, 1943, the maid ordered groceries.

[351] On June 7, 1943 the maid ordered food.

On June 8, 1953 the maid ordered groceries.

On June 10, 1943 the maid ordered food.

On June 18, 1943 the maid ordered food; meat, fruit and vegetables.

On June 21, 1943 the maid called to order fruit and vegetables.

On June 23, 1943 the maid called and ordered meat and groceries.

On July 9, 1943 Mrs. Costello called and ordered meat and chickens.

On July 13, 1953 the maid called and ordered vegetables.

On July 15, 1943 Mrs Costello called and ordered vegetables, groceries and meat.

Thomas A. Wadden—for Defendant—Direct

On July 21, 1953 the maid called and ordered groceries.

On July 22, 1943 the maid called and ordered groceries.

July 24, 1943 the maid called and ordered meat and groceries.

On July 27, 1943 Mrs. Costello called and ordered a nine-pound pot roast.

On August 7, 1943, the maid called and [352] ordered groceries.

On Augest 9, 1943 the maid called and ordered meat and vegetables.

On August 12, 1943 the maid called and ordered food.

On August 14, 1943 the maid called and ordered meat and vegetables.

On August 13, 1943 Mrs. Costello called and ordered lamb shanks, one pound of beef and other assorted meats and various vegetables.

On August 21, 1943 the maid called and ordered meat and vegetables.

On August 23, 1943 the maid called and ordered meat and vegetables.

On August 24, 1943 the maid called and ordered vegetables.

On August 26, 1943 Mrs Costello called and ordered meat and vegetables.

September 1, 1943 the maid called and ordered two porgies.

On September 17, 1943, Mrs. Costello called and ordered meat.

On September 21, 1943 Mrs. Costello called and ordered meat, vegetables and bread.

[353] On September 23, 1943 Mrs. Costello ordered meat.

On September 28, 1943 Mrs. Costello called and ordered lamb, vegetables and groceries.

On October 14, 1942 Mrs. Costello called and ordered food.

Thomas A. Wadden—for Defendant—Direct

On October 26, 1943 the maid called and ordered food.

Q. Now, is this store different from the store which has been previously identified as the Majestic Food Market? A. Yes. It is my understanding it is, sir.

Q. Now, did a witness testify from this store at the trial? A. A Mr. Eugene Friedman testified at page 1368 of the record.

Q. In what year did the expenditures take place to which he testified?

The Court: What was that record page?
The Witness: 1368, your Honor.
In the year 1949, $75.42.

Q. Now, were there any interceptions over the lines which we are interested in of conversations between either the Costellos of the New York Life [354] Insurance Company? A. Yes, there were.

On August 16, 1943 there are two calls. Mr. Costello was calling to check upon certain moneys which he received on the redemption of a New York Life Insurance policy.

Q. Now who was the witness who testified from the New York Life Insurance Company at the trial? A. His name was Charles Lohse at page 777 of the record.

Q. Now what expenditures were shown, proven at the trial running to the New York Life Insurance Company? A. In 1938, $804.60.

In 1939, $329.82.

In 1940, $804.60.

In 1941, $804.60.

In 1942, $402.30; for a total of $3,145.92.

Q. Now, did you find any interceptions over the lines indicated of conversations between the Costellos and persons at a cleaning establishment known as Renard? A. I did.

On March 27, 1951 Mr. Renard called the [355] Costello maid concerning certain dry cleaning of the Costellos.

The Court: What was that year?
The Witness: March 27, 1951, your Honor.

Q. Now, did any witness from this establishment testify at the time of the trial? A. Mr. Alfred H. Renard testified at page 1124.

Q. To what expenditures did he testify? A. In 1947, $275.35.

In 1948, $473.75.

In 1949, $437.90; for a total of $1187.

Q. Did you find any intercepted conversations over the two lines we are interested in of conversations running to Saks Fifth Avenue? A. Yes, I did.

On July 10, 1946 Mrs. Costello called Saks concerning a purchase which she had made.

The Court: What was that date?
The Witness: July 10, 1946, your Honor.

Q. Were there any expenditures proven at the trial running to Saks Fifth Avenue? A. Yes, there were.

In 1946, $775.48.

In 1947, $714.26.

[356] In 1948, $777.98.

In 1949, $847.85; for a total of $3,116.57.

Q. Who was the witness who testified to those expenditures? A. Mr. Sam Kalmus at page 693 of the record.

Q. Did you find any intercepted calls running from the Costello residence to a company known as Otto Von Drak? A. Yes, I did.

On May 14, 1943 Mrs. Costello called an unidentified man at Von Drak's regarding the delivery of furniture.

Thomas A. Wadden—for Defendant—Direct

On May 18, 1943 an unidentified woman called the maid regarding delivery of furniture and payment of a bill in the amount of $48.

On May 18, 1943 an unidentified person called the maid regarding a furniture bill in the amount of $41.

On May 19, 1943 an unidentified person called the maid regarding a bench to be delivered on that date and a bill in the amount of $48.

[357] Q. Were there expenditures proven at the trial running to Otto Von Drak? A. There were. They were proven by Mr. Von Drak at page 1131 of the record.

Q. And what were those expenditures? A. In 1942, $15; in 1943, $48; in 1944, $15; in 1945, $15, for a sub-total of $93.

In 1947, $29.72; in 1949, $64.24, for a sub-total during the taxable years in question of $93.36.

Q. Did you find any intercepted calls running between the Costellos and a drug store known as the Weiner Pharmacy, W-e-i-n-e-r, at 257 Columbus Avenue? A. I did, sir. On May 14, 1943, the maid called to order light bulbs.

On May 31, 1943, the maid called to order a carton of cigarettes.

On June 10, 1943, the maid called to order light bulbs.

On June 15, 1943, the maid called to order a quart of ice cream.

On July 9, 1943, Mrs. Costello called to order some cigarettes.

On August 25, 1943, Mrs. Costello called to order some drugs.

[358] On June 17, 1946, Mrs. Costello called and asked that a prescription 24,300 of Dr. Keenes be filled and sent out to her.

On June 19, 1946, Mrs. Costello called to order drugs and a number of stamps.

On August 2, 1946, Mrs. Costello called to order certain bathroom accessories.

On May 25, 1951, Mrs. Costello called to order a refill of a prescription given to her by Dr. Nelson.

On June 26, 1951, Mrs. Costello called for cigarettes and lighter fluid.

On June 13, 1951, Mrs. Costello called for a prescription and cigarettes.

On March 13, 1952, Mrs. Costello called and requested that her order be sent over as she was going out.

Q. Were any expenditures proven at the trial running to this drug store? A. There were. They were proven by Aida, is the first name, the last name is Menschel, at page 870 of the record.

Q. What were those expenditures? A. 1946, it was $188.17; 1947, $198.10; 1948, [359] $196.24; 1949, $287.48, for a total during the taxable years of $869.96.

Q. Were there any intercepted telephone conversations between the Costellos and the garage known as the West 68th Street Garage at 308 West 68th Street? A. Yes, there were. On June 4, 1943, Mrs. Costello called George Walsh, an employee of this garage, concerning a bill for $59.

On June 21, 1943, Mrs. Costello called and ordered her car.

On June 25, 1943, the same call.

On June 29, 1943, Mrs. Costello called an unidentified man and asked if the garage had any application blanks for license and ordered her car.

On July 14, 1943, Mrs. Costello ordered her car.

The same transaction on July 16, 1943; also, on July 21, 1943; also, on July 28, 1943, and also on August 3, 1943.

Q. These dates you are giving are all intercepted calls? A. That is correct. On August 8, 1943, Mrs. Costello ordered her car. The same interceptions were made on August 13, 1943, August 16, 1943, [360] August 20, 1943, August 25, 1943, September 9, 1943, September 18, 1943.

Thomas A. Wadden—for Defendant—Direct

On September 20, 1943, the maid ordered the car.

On September 22, Mrs. Costello called for her car.

On September 24, Mrs. Costello made two calls regarding license application.

On September 28, 1943, Mrs. Costello called for her car.

On September 29, the maid called for the car.

On September 30, Mrs. Costello called for the car.

On October 13, 1953, Mrs. Costello called Joe. He later returned the call and they discussed the procedure necessary for the filling out of the license, I believe.

Q. Were there expenditures made and proven at the trial for the West 68th Street Garage? A. For the year 1945, $342.52. The witness who testified was Mr. Morris Rabinowitz, R-a-b-i-n-o-w-i-t-z, at page 1141 of the record.

Q. Were there other—

> Mr. Christy: Excuse me just a minute, your [361] Honor. I think Mr. Williams has made a mistake. That West 68th Street Garage which he refers to, at least which is related to the taps there, is not the one which we proved during the course of the trial. There was a West 68th Street, but the one we are talking about I think is at 230 West 68th Street, which we proved. I think Mr. Williams has another one.
>
> Mr. Williams: I am just about to try to clear that up. It is confusing in my mind. I was about to try to clear it up by my next question.

By Mr. Williams:

Q. Were there interceptions running or interceptions made of calls running from the Costello residence to a garage identified in the intercepted transcriptions as the West 69th Street Garage? A. Yes, Mr. Williams, there were.

Q. And on what dates did those interceptions take place? A. On June 25, 1946, Mrs. Costello called an unidentified person and asked that the car be delivered full of gas for a trip to Jersey.

On July 2, 1946, an unidentified woman called Mrs. Costello and asked about a tire for the car and was told to have the car there at 8 a. m.

[362] On July 11, 1946, Mrs. Costello called an unidentified man to ask about new tires and was told they had been put on.

On July 19, 1946, Mrs. Costello called an unidentified person to ask for the car to be sent over.

Q. Now, those interceptions were identified in the transcriptions as to the West 69th Street Garage; is that correct? A. So my notes indicate, Mr. Williams.

The Court: What page?

Mr. Williams: The page of the record—

Q. Do you have the page or the record on which the witness Rabinowitz testified? A. 1141, your Honor.

The Court: That is the one you just gave us as the page for—what is it called—West 68th Street?

Mr. Williams: That is right, your Honor. That is where the confusion exists on these two garages.

The Court: It hasn't been clarified.

Mr. Williams: I understand that, your Honor. I have the record here and I think Mr. Christy will stipulate that the witness testified that he operated [363] the West 68th Street Garage. I have the record here at page 1141 where the question is asked of him:

"Mr. Rabinowitz, did you operate the West 68th Street Garage?"

And his answer is, "I did."

He said it was located at 230 West 68th Street, and then he proceeds to testify to an expenditure in the amount of $345.52.

Now, the transcriptions, your Honor, indicate calls made to the West 68th Street Garage but at certain of the transcriptions calls for the West 69th Street Garage.

The Court: It may be it ran from one block to the other.

Mr. Christy: The witness testified to the Strand Garage in the first part of his testimony, and the Strand Garage is located at 308 West 68th Street, which should be on Mr. Wadden's records there.

Mr. Williams: That is the address we have for this garage, 308 West 68th Street.

Mr. Christy: Mr. Rabinowitz testified about the one at 230 West 68th Street. There is a slight difference.

[364] Mr. Williams: Your Honor—

The Court: Did anybody testify about garage bills for a garage at West 68th Street other than Rabinowitz?

Mr. Christy: Just a second, your Honor. I have to check it.

The Court: I don't think the world will come to an end if this confusion persists a little longer and maybe you can find out what the basis for it is, but let's get along now.

By Mr. Williams:

Q. Did your search of the records indicate any intercepted conversations between the defendant Costello and a lawyer named George Wolf? A. Yes, sir, the search did so indicate.

Q. Would you tell us when those interceptions took place? A. On September 25, 1943, Mr. Costello called Mr. Wolf to make arrangements for a meeting apparently at Mr. Wolf's office.

On September 27, 1943, Mr. Costello called Mr. Wolf to make arrangements for a meeting on the way to the office.

On October 1, 1943, Mr. Wolf called Mr. [365] Costello and arranged for a meeting.

On October 4, 1943, Mr. Wolf called for Mr. Costello, who was out.

On October 11, 1943, Mr. Wolf called for Mr. Costello and arranged for an appointment.

On October 15, 1943, Mr. Costello called an unidentified person looking for Mr. Wolf who apparently had missed an appointment.

On October 26, 1943, Mr. Wolf called his office to check in—

The Court: What is the last date?

The Witness: October 26, 1943, your Honor.

The Court: Thank you.

A. (Continuing) —Mr. Wolf called his office to check in.

On June 15, 1946, Mr. Costello called Mr. Wolf's office. He was told that Mr. Wolf was not going to Hot Springs but was coming home.

On July 2, 1946, Mr. Wolf called Mr. Costello. They discussed estimates on buildings—on a building, selling property, and Mr. Wolf asked Mr. Costello if he had a charity contract and receipts, and Mr. Costello told him to draw a check.

[366] The Court: What is the date of that?

The Witness: That is July 2, 1946, your Honor.

Your Honor, might I explain something about these 1946 taps?

The Court: Does Mr. Williams want you to explain it?

Mr. Williams: Yes. Anything you can add.

The Witness: Your Honor, in 1946 it was the practice of the District Attorney's Office to make recordings, and so often the officer that was making the transcription would just put down a statement "etc.", they were talking about a building, finances, etc., because he knew that in the record there was a full transcription, and that is why, your Honor, some of these 1946s may seem very short. The 1946 records, that is, the audible records, I understand, are no longer in existence.

A. (Continuing) On December 7, 1950, Mrs. Costello called a Mrs. Toplitz. She told Mrs. Toplitz that Mr. Wolf was helping her with an press company.

On December 11, 1950, Mr. Wolf called Mrs. Costello and told her he had an interesting letter to [367] show her.

On December 12, 1950, Mr. Wolf called Mr. Costello to tell him he was going to court and would be in his office after 2 o'clock.

On December 13, 1950, Mr. Wolf called Mrs. Costello and asked her to have lunch with him.

On December 18, 1950, Mr. Costello was called by Mr. Wolf and asked to drop by Mr. Wolf's office.

On January 3, 1951, Mr. Wolf called Mr. Costello and asked Mr. Costello to come by his office.

On January 8, 1951, Mr. Wolf called Mr. Costello and asked him to stop by his office.

On January 26, 1951, Mr. Wolf called Mr. Costello to ask him to stop by the office and discuss—and they discussed meeting with another individual.

On February 2, 1951, Mr. Wolf called Mr. Costello and asked him to stop by the office.

On February 9, 1951, Mrs. Costello called Mr. Wolf and thanked him for a broiler.

On February 14, 1951, Mr. Wolf called and talked to the maid. He told her he would not be at the office.

On February 16, 1951, Mr. Wolf called Frank Costello and told him he would be up in 10 minutes.

[368] On March 2, 1951, Mr. Wolf called Mr. Costello to arrange a meeting.

On March 8, 1951, Mr. Wolf called Mr. Costello to make a date.

On March 12, 1951, Mr. Costello called Mr. Wolf and asked him if anything had happened and to make a date.

On March 17, 1951, Mr. Wolf called Halley at the court house with reference to doctor's report on Frank Costello and his ability to testify. He asked a delay for a few days. Dr. Ahearn's report said Mr. Costello was able to testify only two hours a day.

On March 18, 1951, Mr. Wolf called Mr. Costello and gave Mr. Costello a phone number.

On March 19, 1951, Mr. Wolf called the office regarding work an associate by the name of Fictor was doing on a legal argument. He stated the purpose of the committee was only to get Mr. Costello to incriminate himself.

On March 19, 1951, Mr. Wolf called his office and continued the above transcription about four hours later—the above phone call which I already identified on March 19, the first call.

Also on the same date, Mr. Wolf called the [369] committee trying to locate Mr. Halley.

On March 19, 1951, George Wolf called the office at 12:47. He talked to Victor again.

Again on March 19, 1951, Mr. Wolf called Mr. Polakoff.

Q. Is that Mr. Polakoff, a lawyer in New York? A. Yes, I would say from the tap it was. They discussed how Wolf was first retained by Polakoff to represent Mr.

Costello; that he met Mr. Costello after the Aurellio case in 1943.

March 19, 1951, Halley's office called George Wolf and told Wolf to be down at the committee by 3 p.m.

March 20, 1951, George Wolf called Feingold and requested material finished to be brought to Wolf.

On March 16, 1951, Mr. Costello called George Wolf. They arranged for Mr. Costello to stop by Mr. Wolf's office.

On June 26, 1951, Mr. Wolf called Mr. Costello and asked him to stop by the office.

On July 12, 1951, an unidentified person called Mr. Wolf's office and wanted to see Mr. Wolf. This was made on Mr. Costello's phone.

On June 12, 1951, Mr. Costello called Vic and [370] said he would come down to the office in the afternoon.

On July 24, 1951, Mr. Wolf called Mr. Costello and they discussed a letter which they had received.

On August 3, 1951, Mr. Wolf called Mr. Costello and discussed with Mr. Costello talking to a man about a contract.

On August 23, 1951, Mr. Wolf called Mr. Costello and asked Mr. Costello to be in his office at 9:30.

On September 5, 1951, Mr. Wolf called Mr. Costello and asked him to stop by the office.

On September 6, 1951, Mr. Wolf called Mrs. Costello to see if Mr. Costello was coming to his office.

On September 11, 1951, Mr. Costello called Mr. Wolf's office. His secretary told him Mr. Costello's appointment was on Broadway Street.

The Court: On what?

The Witness: 270 Broadway, your Honor.

A. (Continuing) September 12, 1951, George Wolf called Mr. Costello and they arranged to have lunch together.

On September 13, 1951, George Wolf called his [371] office and asked about a letter concerning a meeting.

On September 28, 1951, George Wolf called Mr. Costello. They arranged to meet in Mr. Wolf's office.

On October 30, 1951, George Wolf called Mr. Costello. They arranged to meet in the office at 11 o'clock.

On November 20, 1951, Mr. Wolf called Mr. Costello for Mr. Costello to meet him.

On November 26, 1951, Mr. Wolf called to make a meeting with Mr. Costello.

On December 10, 1951, George Wolf called Mrs. Costello.

On December 12, 1951, Mr. Wolf called Mrs. Costello and she told him that Mr. Costello would come to his office.

On December 17, 1951, Mr. Wolf called Mrs. Costello. She told him that Mr. Costello would see him later.

On December 21, 1951, Mr. Wolf called Mrs. Costello long distance. He asked if Mr. Costello wanted him to return to New York and wished her a happy New Year.

On January 2, 1952, Mr. Wolf called Mr. [372] Costello and they arranged for Mr. Costello to stop at Mr. Wolf's office.

On January 4, 1952, Mr. Wolf called Mr. Costello. They arranged for Mr. Costello to stop by the office.

On February 6, 1952, Mr. Wolf called Mr. Costello. Mr. Wolf said he would be in the office at 10 o'clock.

On February 20, 1952, Mr. Costello called Vic and said he had reports he wanted to show Vic.

On February 25, 1952, Mrs. George Wolf called Mr. Costello. She said Mr. George Wolf was in the hospital and Frank Costello should talk to Vic about the income tax matters.

Q. Were you able to identify Vic from the conversation? Is that Victor Feingold, a lawyer in Mr. Wolf's office? A. Yes, that is correct.

On March 4, 1952, Mr. Wolf called Mr. Costello. Mr. Costello said he would meet Mr. Wolf in his office at 3.

On March 12, 1952, Mr. Wolf called Mr. Costello to say he was still sick and Mr. Costello said that Vic was with him, Mr. Costello, at that time.

[373] On March 20, 1952, Mr. Wolf called Mr. Costello. He asked him to meet him in the office at 12:30.

On March 17, 1951, Mr. Wolf called Mr. Delaney regarding where each would be during the day.

Q. Were any expenditures proven through the witness Wolf? A. Yes, there were. They were testified to by Mr. Wolf himself at page 988 in the record.

For the year 1943, $2,000—

The Court: What page?

The Witness: Page 988, your Honor.

By Mr. Williams:

Q. What you are now testifying to are payments to Wolf himself; is that right? A. That is what the record indicates, Mr. Williams.

In 1943, $2,000; 1944, $3,500; 1945, $2,400, for a sub-total of $7,900.

In 1947, $825; in 1948, $2,500; in 1949, 2,000, for a sub-total during the taxable years in question of $5,325.

Q. Did the witness Wolf testify to other expenditures at the trial? A. Yes. Mr. Wolf also gave testimony concerning [374] payments to the Corporation Counsel, to Meteor Holding Corporation, the Copacabana Salvation Army dinner, the Rothstein estate, to Columbia Casualty Company and 585 West End Avenue Corporation.

Q. What amounts were they? A. Personal, George Wolf, was $399.10.

Q. Is that a reimbursement of expense item? A. My notes do not reflect, Mr. Williams.

Corporation Counsel, $166.45; the Meteor Holding Corporation, $775; Salvation Army dinner, $2,199.05; the Rothstein estate, $5,000; Columbia Casualty Company, $1,000; 585 West End Avenue Corporation, $482.95.

The Court: Does that finish with Mr. Wolf?

Mr. Williams: Yes.

The Court: We will recess now. 2:15, gentlemen.

Gentlemen, because of other commitments, we will have to adjourn at 4 this afternoon instead of the customary 4:30.

(Recess taken until 2:15 p.m.)

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[375] Afternoon Session—2.00 p.m.

Thomas A. Wadden, resumed.

Mr. Williams: Your Honor, Commissioner Melia and Mr. Herzog are here, one from the Police Commissioner's office and one from the Division of Investigation and they have asked me to pass on to your Honor at this stage that they would like to argue motions to quash certain subpoenas that have been served on each office. The subpoenas, your Honor, are in all respects the same as the subpoena served on Mr. Hogan's office. I told them I would give this information to your Honor. I don't know what your disposition is on that. It may be premature to discuss the question of these subpoenas at this time.

The Court: Where are they? Commissioner Melia?

Commissioner Melia: May it please the Court—

The Court: Pardon me just a minute. Have you complied with the subpoena or is it your position that you ought not to be compelled to comply with it?

Commissioner Melia: The second, your Honor. We are in the position that the information sought by [376] the petitioner is privileged and confidential.

The Court: Now before you go ahead, what was your plan with respect to when you intended to call for those and put them in?

Mr. Williams: I would not be able to reach it today, your Honor, at all and I doubt whether we would reach this juncture of our case tomorrow.

The Court: Well, that is really what I was thinking about, Commissioner. There are some witnesses here, agents of the Government who are being kept away from their work while they are waiting here to be called to testify and I was wondering if it might be just as convenient for you to wait until we have disposed of them, until the time comes when Mr. Williams proposes to offer these records or rather to call for them and then have your motion made at that time.

Commissioner Melia: I think that would be very convenient for my office.

Mr. Williams: I would be glad, your Honor, to put both of these gentlemen on call. If they would give me their phone numbers I would keep them advised as to the posture of the case so they wouldn't lose any time.

[377] The Court: Suppose we do it that way and that won't interrupt the testimony that is being brought in.

Thomas A. Wadden—for Defendant—Direct

Mr. Christy: Your Honor, before Mr. Williams resumes with Mr. Wadden may I just state for the record that with regard to the garages about which there was some dispute this morning, that I have checked our records. There were two witnesses who testified about garages. They were both from the same garage, that one at 230 West 68th Street; one man for one period and another man for another period. There is no evidence, no testimony about the so-called Strand garage which I think was at 308 West 68th Street, and the one to which Mr. Wadden alluded from his notes this morning.

The Court: Very well.

Direct examination continued by Mr. Williams:

Q. Mr. Wadden, did you find any interceptions of telephone messages emanating from over the lines that are in question here to the Roosevelt Hotel in New Orleans? A. Yes, sir, I did.

On May 27, 1943, Mr. Costello called Mr. Castel at the Roosevelt Hotel.

[378] On June 1, 1943, Mr. Costello called Mrs. Costello at the Roosevelt Hotel regarding a trip she had taken.

On June 3, 1943, Mr. Costello called Mr. Castel regarding a license and associates, his associates.

On July 29, 1943, Mr. Costello called Mr. Castel. They discussed the business equipment and politics in Louisiana.

On August 18, 1943, Mr. Costello called Mr. Castel regarding business assessments on something referred to as a big item. It was with reference to attorneys and fees that were being demanded.

On September 7, 1943, Mr. Costello called Mr. Castel regarding business and non-receipt of a check, the Aurellio tap, papers and publicity.

Thomas A. Wadden—for Defendant—Direct

[379] Q. Were there expenditures proven at the trial running to the Roosevelt Hotel in New Orleans? A. There were. They were proven by Mr. Eugene Huppenbauer at page 950 of the record.

In 1940, $54; in 1942, $93; in 1943, $592.24; in 1945, $1,885.44, for a sub-total of $2,625.18.

During the taxable period 1946, $619.01; 1948, $1,004.56; 1949, $1,867.12, for a sub-total during those years of $3,490.69.

Q. Were there any conversations intercepted emanating from the lines in question to a store known as Wilma Gowns, Inc.?

The Court: Mr. Williams, I have just this suggestion, and it is only for the purpose of saving time. I take it you have a copy of what your witness has here.

Mr. Williams: Yes, sir.

The Court: Might it be just as well, instead of asking him this same line of questions—I take it what he is going to testify to is telephone taps which relate to either persons or business enterprises concerning which some payments from the defendant to those persons were made and testified to at the trial.

[380] Mr. Williams: Yes.

The Court: So he can take one after another and give them to us.

The Witness: There was no direct tap—

The Court: This is what?

The Witness: Wilma Gowns, your Honor; Wilma Gowns, Inc., 4 West 50th Street.

There was no direct interception of telephonic calls between the Costello residence and Wilma Gowns. There was an interception of telephonic calls between one of the employees at Wilma Gowns who did work for Miss Costello on the side. Her

name is Gloria—Your Honor, I apparently did not transcribe from my rough notes or my original notes her last name or her phone number, which I will be glad to supply tomorrow.

From October 11, 1950, through June 12, 1951, there were 19 phone calls between the Costello phone and this individual identified as Gloria. They had to do with making appointments for Gloria to come over and do certain work for her and repair her clothes and take her clothes up.

As for the Wilma Gowns, Sylvia Thal testified in the record at page 1169 concerning the expenditures, [381] and they were as follows—

The Court: What page is that in the record?

The Witness: 1169, your Honor—$1947, $4,912.44; in 1948, $2,660.45; in 1949, $1,267.03, for a total of $8,839.92.

Q. Was there another witness who testified concerning these expenditures? A. Mr. Louis Handelsman, who was at that time a special agent of the Bureau of Internal Revenue, also testified at page 1,176 of the record.

Mr. Williams: Your Honor, I don't think this will take long, but I do think that we ought to have the dates of the transcriptions so that when I offer these in evidence I will only be offering those particular transcriptions from a great mass of evidence.

The Court: All right.

Q. So just give us the date of them. A. October 11, 1950, September 7, 1950, December 12, 1950, January 15, 1951, January 23, 1951, January 30, 1951, February 1, 1951, March 8, 1951, March 12, 1951, April 17, 1951, April 23, 1951, April 24, 1951, May 1, 1951, May 8, 1951, May 10, 1951, May 11, 1951, May 31, 1951, June 5, 1951, and June 12, 1951.

Thomas A. Wadden—for Defendant—Direct

[382] The next expenditure is to Helen Spaer. She testified in the record at page 1242.

On September 3, 1946, Mrs. Costello's maid called Helen Spaer and was told that Miss Spaer was not in. Immediately thereafter Mrs. Costello called her maid and left another message for Helen Spaer. The expenditures are as follows:

1948, $160; 1949, $160, for a total during the taxable years of $320.

The next is the New York Veteran Hospital at 144 East 57th Street, New York City.

Q. Excuse me, Mr. Wadden. You mean Veterinary Hospital? A. Veterinary Hospital. The witness who testified was Miss Elizabeth Bute at page 1191 in the record.

There were two wiretap—two interceptions—

The Court: Is that page 1191?
The Witness: Yes, your Honor.
The Court: Very well.

A. (Continuing) There were two interceptions on June 13, 1946. Mrs. Costello called Dr. Stark about her dog Tiny.

On June 14, 1946, Mrs. Costello again called on the same subject.

[383] In 1945, there was an expenditure of $59.75 proven; in 1946, $134.75; in 1947, $35; in 1948, $89; in 1949, $61, for a total during the taxable years of $320.25.

The next item is the Hollywood Beach Hotel located in Florida. The witness who testified was Paul D. Bromberg, and he testified at page 910 in the record.

On October 9, 1950, Mr. George Wolf called Mrs. Costello and she said she was going to the Hollywood Beach Hotel in Miami, Florida.

On February 14, 1952, Mrs. Costello called Mr. Costello and discussed her visit in Hollywood, Florida.

The Court: 1952?
The Witness: 1952, your Honor.

A. (Continuing) On February 19, 1952, Mr. Costello called Mrs. Costello at the Hollywood Beach Hotel. The expenditures proven were: 1946, $1,832.67.

The next item is Mary Branch. She testified at page 1237 of the record. She was identified throughout the interceptions as the maid. She was referred to as Mary.

[384] In 1942, $96 was proven.

The Court: Was what? What was she referred to, did you say?

The Witness: She was one of the maids, your Honor. She was identified as a maid who talked over the phone.

A. (Continuing) In 1942, $96 was proven; 1943, $666; 1944, $900; in 1945, $1,360, for a total of $3,016.

The next item is Estelle Brown. She testified at page 1232 of the record. She likewise, your Honor, was identified throughout the record as one of the maids.

The Court: And what was the page in the record?

The Witness: 1232.

By Mr. Williams:

Q. When you say "throughout the record"— A. I am talking about the wiretap intereceptions records, Mr. Williams.

(Continuing) In 1937, $80; in 1938, $520; in 1939, $520; in 1940, $520, in 1941, $520; in 1942, $624; in 1943, $780; in 1944, $1,080; in 1945, $1,300, for a sub-total of $5,944.

Thomas A. Wadden—for Defendant—Direct

[384a] During the taxable year the following amounts were proved: 1946, $1,300; 1947, $1,560; 1948, $1,820; 1949, $2,080, for a sub-total of $6,760 during the tax period in question.

[385] The next item is the Terminal Barber Shop located at the Waldorf-Astoria.

Mr. Anthony Menniaci testified at page 1894 of the record. There was an interception between the Costello phone and that at the barber shop on July 2nd, 1946.

Mrs. Costello called Mr. Costello there.

The following expenditures were proven:

1940, $130.

1941, $130.

1942, $130.

1943, $158.

1944, $168.

1945, $168; for a sub-total of $884.

1946, $188.

1947, $195.

1948, $195.

1949, $195; for a sub-total of $773.

Q. Dr. Douglas Quick testified at page 1338 of the record.

On March 15, 1951 and on March 16 and March 17 of the same year there were calls to and from Dr. Quick regarding Frank Costello's throat condition.

In 1938—

[386] The Court: Calls to and from? You mean calls that came over the telephone?

The Witness: Yes.

The Court: At Costello's home?

The Witness: Yes, your Honor.

The Court: What page is Dr. Quick's testimony?

The Witness: 1338, your Honor.

1938, $35.

1939, $550.

1940, $275.

1941, $225; for a total of $1085.

The next item is Sheffield Farms, Inc. of New York City. John Rutherford testified concerning this expenditure at page 744 of the record.

On July 8, 1953, Mrs. Costello called the milk company and asked that a certain amount of milk, eggs and cream be delivered.

1946, $8.46.

1947, $258.67.

1948, $376.93.

1949, $142.97; for a total of $787.03.

St. Vincent's Hospital, New York City, Mr. Walter O'Rourke testified at page 628 in the record. I include this, your Honor. There is no direct [387] wiretap because Dr. Lore committed Mr. Costello to the St. Vincent's Hospital, and it was my belief that unless they located Dr. Lore—

Mr. Williams: I will withdraw that, your Honor. I don't want to press that one any further.

The Court: Isn't that also true of the maids?

Mr. Williams: The testimony as to the maids, your Honor, was that there were direct calls from the maids, during which the maids identified themselves as the maids, and their names were actually in the transcription.

The Court: Does anybody question the fact that they were maids? I don't see how the maids differ from this. However, I am not going to restrict you if you want it in, but I don't know what that is going to prove.

Mr. Williams: The maids were actually—

The Court: That is a matter of argument later on. Go ahead.

The Witness: That completes my analysis, your Honor.

The Court: The witness says he has given us now all the data which he secured from an examination of the District Attorney's tap records.

[388] Mr. Williams: Your Honor, this is a matter of addition, really, and I say this subject to overnight confirmation, but I think it might be appropriate for the record to show that the total amount of expenditures—

Mr. Christy: Your Honor, I will object to any question of the total amount.

The Court: Well, will you wait until I hear what he has to say?

You are proposing now, Mr. Williams, I take it to give me the total of these expenditures that this witness has told us about?

Mr. Williams: Yes.

The Court: Now what is the objection?

Mr. Christy: I would object on the ground that it is irrelevant and immaterial, just to add up the expenditures which Mr. Wadden has testified to.

The Court: Well, I suppose Mr. Williams' point is that it has some probative value to show the importance of these taps, indicating that a very large amount of money of the defendant was accounted for in this way or shown in this way; that the amount was large enough to show that this had some important bearing on the preparation of the Government's case. [389] I will allow it.

Mr. Christy: It seems to me, your Honor, it would be probative proof in the event he could connect them up between the taps and the Treasury agents.

Outside of that I don't see that it has any value whatsoever.

The Court: That is true and he may never be able to connect it up, and it is only a question of the order of proof, whether you are going to take the trouble now or at some other time. If it is not tied up none of it is material. There is no reason for excluding it now. I will take it.

Mr. Williams: Your Honor, I have $149,474.94 for the total.

The Court: What is the figure? 149—

Mr. Williams: 474.94.

The Court: Now that figure at the moment doesn't mean very much to me because I can't tell from the testimony that has come in so far as to what years that covers, whether it covers the years from—

Mr. Williams: We propose to break this down overnight, your Honor, between that period before 1946 and that period from 1946 through 1949.

The Court: It has various values then. [390] However, we will accept it.

Mr. Williams: You may cross-examine.

Mr. Christy: I have no questions, your Honor.

Mr. Williams: Your Honor, at this time I want to offer into evidence those transcriptions to which the witness Wadden has testified, but I recognize that physically it would be an almost impossible job time-wise for us to go through and segregate them. So my suggestion is that they be received en masse with the understanding that the only taps which are to remain through our motion are the taps to which Mr. Wadden has given testimony.

The Court: Are you suggesting that I am going to take the time some afternoon to go through them and pick them out, or are you going to pick them out?

You have marked them for identification here and I shall expect if you want to draw my attention to a particular piece of paper that you are going to pick it out.

Mr. Williams: Surely.

Mr. Wadden has testified in a perfunctory way as to the substance of these conversations, and in the absence of contradictory evidence, presumably, [391] that would be credible evidence for whatever probative value it may have.

Now my only thought is if we went through and pulled out those taps which have relevance to the case, we would be disrupting the records of the District Attorney's office and it probably isn't necessary to do it if it can be avoided.

The Court: It is your case, Mr. Williams. You decide what you want to do and I will try to do the best I can with whatever you put in, but I assure you now that I am not going to allow you to dump into my lap this vast amount of cards and pieces of paper in the hope that I will be able to sift out what you have in your mind.

Mr. Williams: I certainly don't expect the Court to do that and I will—

The Court: Well, it was a good try there for a minute. All right, go ahead.

You pick out what there is in there that you want me to see or decide whether you want to rest on the testimony of your witnesses.

Mr. Williams: Yes, sir. We will segregate those and present them to your Honor, but I am not offering, your Honor, those taps which have no relevancy [392] to the case.

The Court: Well, at the moment you are not offering anything. Are you offering them all?

Mr. Williams: Yes.

The Court: All right, then, that offer is rejected.

Mr. Williams: I am offering all the taps, your Honor, which have been testified to.

The Court: Now, Mr. Williams, let's you and me not fence. I used to be on the other side of the fence at one time, too. If you want to put anything in here, either from the testimony of witnesses or exhibits, you may offer it, but I certainly will not permit you to put in evidence a lot of documents which by your own admission are not relevant. You pick out what is relevant and I will accept this.

Mr. Williams: We cheerfully would have done this, your Honor, but we couldn't do it because we were not permitted to do it.

The Court: Well, I am not scolding you because you haven't done what was impossible; I am only scolding you for suggesting that I do the impossible.

[393] Mr. Williams: I am not making that suggestion, your Honor.

The Court: Well, you say you didn't make it, but I can't translate what you said in any other way but that that is precisely what you want me to do.

Mr. Williams: If anything I said lent itself to an understanding on your Honor's part that I intended that you segregate these records, I hasten to correct whatever I said that gave your Honor that understanding, because I never intended that you would go through these records, and I say to you now that we will do it for your Honor and we will present the transcriptions to your Honor.

The Court: Very well.

Peter F. Geissler—for Defendant—Direct

[394] PETER F. GEISSLER, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Mr. Williams: Your Honor, I might say that chronologically this is not the most perfect sequence for us to put our case in, but Mr. Leath reminded me this morning that Mr. Geissler was from Albuquerque and suggested I put him on first so he need not remain here in New York. So I am calling him somewhat out of turn.

The Court: Very well.

Direct examination by Mr. Williams:

Q. Would you state your full name, please? A. Peter F. Geissler.

Q. And what is your occupation? A. Special Agent, Intelligence Division, Internal Revenue Service.

Q. How long have you been so employed? A. Since October, 1945.

Q. And in what office were you employed in 1945, Mr. Geissler? A. New York office.

Q. How long were you employed in the New York office? [395] A. Until June of 1946.

Q. And at that time you were transferred, I take it? A. Yes, sir.

Q. And that transfer was to, I understand it from Mr. Leath, Albuquerque? A. Yes, sir.

Q. Albuquerque, New Mexico? A. That is right.

Q. Where you now are a special agent with the Bureau of Internal Revenue? A. Yes.

Q. Mr. Geissler, was there ever a time when you worked on the Costello tax case, which is under discussion here today? A. Yes, sir.

Q. And would you fix in point of time when your work on that case began? A. July, 1950.

Q. July of 1950. For how long, to your knowledge, had that case been under investigation at that time?

Mr. Christy: I object, your Honor. He can ask him how long it had been under investigation for [396] the purposes of the tax case, which is all that Mr. Geissler is in a position to testify to.

The Court: Read that to me. I don't quite get that.

Mr. Christy: Your Honor, there were other investigations in that office, but it was an investigation on Costello with regard to tax evasion, and I think the question should be limited to the time that had been put in on investigating the Costello case with regard to tax evasion.

The Court: I do not understand it. I am going to let him testify as fully as Mr. Williams wants and then you can limit it when you take him on cross-examination. The distinction between the Internal Revenue Department conducting an investigation and conducting a tax case is one that I do not quite get.

Mr. Christy: Well, I will settle it on cross-examination, your Honor.

The Court: I think that is a better way to do it. All right.

The Witness: Would you repeat the question?

The Court: What was the question?

[397] *By Mr. Williams:*

Q. My question was, for how long, to your knowledge, Mr. Geissler, has the Costello tax case been under investigation by your office prior to your entry into the case? A. I do not know, sir.

Q. Well, did you initiate the investigation or was it a going investigation at the time that you came in? A. Well,

when the case was assigned to me for investigation, a file, a relatively small file, covering prior activities on investigations in the case was given to me, and from that file I gathered what was the gist of what had been investigated prior to its assignment to me.

Q. From that file could you determine, Mr. Geissler, how long the case had been under investigation? A. I could not determine that, no, sir.

Q. Do you know what agents had worked on the case prior to your taking it over? A. I do not know, sir.

Q. You have no knowledge of that? A. Well, there were certain notations in the [398] file that appeared to be in the handwriting of Mr. Cordes, who was the group supervisor at that time, but who had worked on the case prior to the assignment to me I do not know, sir.

Q. Who assigned you the case, Mr. Geissler? A. Mr. Cordes.

Q. Mr. Cordes? A. Yes, sir.

Q. Did anyone work on the case with you? A. Well, shortly after I was assigned to the case, Revenue Agent Sohn was assigned to work on the case as a joint investigation.

Q. Is that Albert Sohn? A. Yes, sir.

Q. Is he still with the Bureau of Internal Revenue? A. No, sir.

Q. Do you know where he is now? A. I believe he is in private practice.

Q. In what city? A. In New York City.

Q. Now, at the time that you received the background information which you did receive when you got in the case, you said you were given a file; is that [399] correct? A. Yes.

Q. Did that file reflect information which came from telephone calls? A. Yes, sir; some information relative to telephone calls was in that file.

Q. Were those telephone calls, Mr. Geissler, calls to which Costello himself had been a party? A. Some of those calls were made from Mr. Costello's home telephone.

Q. Now, Mr. Geissler, at the time that you took this case over, and I have reference to the period of July, 1950, had a mail cover been put on Mr. Costello? A. It was put on subsequently to the assignment of the investigation to me.

Q. Did you order the mail cover? A. I believe I did, yes, sir.

Q. Can you tell us when the mail cover was put on? A. I cannot give you the exact dates that the mail watch covered, but periodically his mail was covered.

Q. Do you call it a mail watch or a mail cover? A. Mail watch, mail cover, it has the same [400] connotation.

Q. Was that done , Mr. Geissler, by your making a formal request to the Post Office to watch his mail? A. Yes, sir.

Q. Was that watch conducted over specific days of the month or was it a uniform watch throughout the month? A. At that time—

The Court: What time?

Mr. Williams: July, 1950.

The Court: Wait a minute. We don't know. That is what I am trying to fix. He said he started on the case in July and some time after that he ordered the mail cover. When was it, if you recall? We don't want a day.

The Witness: I don't know the specific day, sir.

The Court: Was it in that year 1950?

The Witness: I believe so, yes, sir. Shortly after I was assigned to the case I put a periodic mail watch on Mr. Costello's mail.

Peter F. Geissler—for Defendant—Direct

By Mr. Williams:

Q. What information did you get from the mail [401] watches? A. The Post Office Department would notify us periodically of the mail Mr. Costello received, and it would be the addressors who had sent the mail to Mr. or Mrs. Costello. It generally covered first class mail because in around Christmastime, Christmas cards and material of that nature was disregarded. For first class mail we received notification from the Post Office Department.

Q. Now, do I understand your testimony to be that you received from the Post Office the addressor's name and address? A. Yes, sir.

Q. Did you receive anything else? A. No, sir.

Q. Did you have tracings made on his mail? A. I don't understand your question as to tracings. Exactly what do you mean?

Q. Let me see if I can explain it. In those instances where there was no return address on mail which was sent to Mr. Costello, did the Post Office make tracings of the front of the envelope and turn over the tracing to you? A. No, sir.

[402] Q. They did not do that? A. No, sir.

Q. At any time that you were on the case? A. No, sir.

Q. What use was made of the information that you derived at this time that you are now talking about when you first put the mail cover on Costello's mail; what use was made of that information? A. Well, if the addressor was local, we would make arrangements to contact them in due course and attempt to ascertain the nature of their relations with Mr. Costello.

If the addressor was out of town, I would request through a collateral request that an agent contact the addressor and ascertain the relations of that individual or company with Mr. Costello.

Q. Was the practice to advise the addressor of the fact that you had knowledge that he was corresponding with Mr. Costello and to ask him what the correspondence was about? A. Well, sometimes if we could elicit the information from the addressor without disclosing the source we would do it on that basis, but if the addressor failed to cooperate in the matter, we would [403] confront him with the fact that he had mailed a letter to Mr. Costello and what was the nature of it, if they made a general denial that they had no relations with him.

Q. Now, is it or is it not a fact that the mail watch was intensified between the 25th of each month and the 5th of the ensuing months, those days in which billings would be likely to be sent out? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And the purpose of that was so that you could ascertain where expenditures were being made, is that not so? A. Yes, sir.

Q. Now, do you recall that in the summer and fall of 1950 and that part of the winter that fell in 1950, and I am talking about 1950, when you came in the case, that there were contacts made by you and those working with you on the case? A. Yes, sir.

Q. Of the addressors? A. Yes

Q. Who were the men other than Sohn who were [404] working with you at that time? A. Mr. Sohn was assigned with me until October of 1951, when Revenue Agents Handelsman and Bennett were also assigned to assist in the investigation, and a special agent by the name of Wolf, Joseph Wolf, was assigned to assist in the investigation.

Q. What was Mr. Bennett's name, sir? A. I don't know. I fail to recall. He is a revenue agent in the New York district.

Q. Still in the New York district? A. I understand he is, yes, sir.

Q. Do you recall Mr. Wolf's name? A. Joseph Wolf.

Q. And you were about to say where he was? A. He is a special agent in the Intelligence Division in New York.

Q. Now, Mr. Geissler, for the year 1950 did you keep work papers or records which show the information that you got from the mail cover that you have been describing? A. Yes, sir.

Q. Do you have those records? A. I prepared cards covering these mail watches and I have examined some of the records here but I [405] haven't been able to find some of the records on the mail watch. It will be matters that we investigated.

Q. Where did you examine them, Mr. Geissler? A. Well, I examined the files in the office of the Intelligence Division of the cards that I maintained and in Mr. Christy's office, but apparently some of the cards may have been mislaid or filed in some other place.

Q. I want to ask you the same question, Mr. Geissler, with respect to those telephone calls about which you testified.

Did you keep work papers which showed the disposition of those telephone calls in so far as leads to evidence was concerned? A. Yes, sir.

Q. And do you have those work papers? A. I don't have them, those cards.

Q. Where are they now? A. I do not know where they are.

Q. Have you made any effort to secure them? A. I have looked through the work papers that are available. I had a large group of cards that I indicated on each card a mail watch or a toll call and [406] what disposition was made after the particular party was contacted, and some of these cards I have not found.

Q. Do you know where the ones that are in existence are? A. Yes. Some I have examined in Mr. Christy's office and they are in the files.

Mr. Williams: May I address Mr. Christy?

The Court: Yes.

Mr. Williams: I was going to ask Mr. Christy if he had those cards, your Honor, so I could have them for purposes of examination of the witness.

Mr. Christy: Your Honor, I am not quite sure to what Mr. Geissler is referring. I think that if Mr. Williams can spell it out a little more—

Mr. Williams: I only know what the witness has testified to here this afternoon. He said that he had papers, which I classified as work papers, wherein he showed what disposition he made of the information he got from the mail cover and the information that he got from telephone calls to which Mr. Costello was a party, and I asked him if he had these work papers and he said that he had seen some of them but some of them but some of them apparently have been lost; and when [407] I asked him where they were, I understood him to say that they were in your possession.

Mr. Christy: Your Honor, I do have some papers which I think Mr. Geissler is alluding to—

The Court: Why isn't the easiest way to handle this to let Mr. Geissler investigate. We are going to recess at four o'clock this afternoon. After four o'clock Mr. Geissler can look at these papers and see whether there are any of those that he has just been talking about in his answers to Mr. Williams, and at least they will then be identified, and whatever use or whatever disposition is going to be made of them you can discuss with me if you need to tomorrow morning. There is no sense of holding it up now.

Peter F. Geissler—for Defendant—Direct

By Mr. Williams:

Q. On this mail cover, Mr. Geissler, on what addresses did you have the Post Office place them? A. I don't understand your question.

The Court: You mean what categories?
Mr. Williams: No, your Honor.

Q. Mr. Costello had an apartment at 115 Central Park West; he also had a home at Sands Point, Long Island; is that correct, at that time? [408] A. That's right.

Q. I am asking you whether or not you had a mail cover put on each of these places? A. We did.

Q. Is that right? A. Yes.

Q. Do you know of your own knowledge which postal branches put this mail cover on for you? A. The mail cover is handled through the inspectors, the postal inspectors, at 34th Street, and they make the disposition to the appropriate branch servicing that residence.

Q. Do you recall that the information which you received came from the Port Washington Post Office with respect to the Sands Point cover? A. Well, it had to. If they were surveilling the mail at Port Washington, it would have come out of the Port Washington office there.

Q. Do you recall it was the Ansonia branch at 68th Street and Broadway which was doing the surveillance of the mail at 115 Central Park West? A. I don't recall.

Q. Now, Mr. Geissler, you said that you received telephone numbers which Mr. Costello was calling; is [409] that correct, that he was calling from his residence? A. That's right.

Q. And you inherited these from your predecessor on the case; is that right? A. Yes.

Q. They were already in the file when you got them?

The Court: Will you answer that, please?

A. Yes.

The Court: If you nod your head, the reporter does not hear you, and unless I am looking at you I don't know what you are indicating.

The Witness: I am sorry, your Honor.

The Court: All right.

Q. At the time that you received the file, Mr. Geissler, had your predecessor on the case investigated those calls for leads or did he leave those for you to do? A. Apparently these telephone numbers which were in the file when I was assigned to the case had not been previously investigated.

Q. Did you in fact investigate them? A. I went out and saw the various individuals listed on these calls.

[410] Q. In other words, you went out and you talked to the people to whom the defendant Costello talked, presumably, on these calls? A. Yes, sir.

Q. And when you went out you were looking for expenditures that he had made and financial transactions in which he was engaged? A. Yes, sir.

Q. Can you tell us without your work papers some of those people that you saw? A. I do not recall at this time.

Q. Would your records show that? A. They should show I mean some of the people I contacted from these calls that I received.

The Court: Suppose we take a short recess.

(Short recess.)

[411] Q. Mr. Geissler, at the time that you last worked on this case were all your records intact in the files, as far as you know? A. Yes, sir.

Q. When was that? A. That was, oh, about the—when the case left the special agent's office.

By the Court:

Q. When was that? Mr. Williams is trying to get the date? A. It was about February of 1953.

By Mr. Williams:

Q. Did you work on the case after that? A. I did some work on the case while it was in the U. S. Attorney's office.

Q. Well, at that time were your records intact in your files? A. Yes, sir.

Q. And when was that? A. Well, when the case was referred to the U. S. Attorney's office in 1953, February, as far as I know my records were there?

Q. Well now, you stated at the time the case left the special agent's office and went to the U. S. Attorney's office your records were intact. [412] Then I asked you if you did some work on the case after it got to the United States Attorney's office. A. It hadn't—it had nothing to do with the records that I prepared, the work I did in the U. S. Attorney's office.

Q. What did that office have to do with them?

Mr. Christy: I object to that, your Honor.
The Court: Sustained.

Q. Well, do I understand at the time in 1953—was it 1953 or 1954 when you worked on the case the next time? A. 1953.

The Court: You said it was in 1953 that the case went to the U. S. Attorney's office and at that time your records were then intact.
The Witness: Yes.

Q. And what was the next time when you saw your records in this case? A. When I was called in in January of this year, of 1957.

Q. And at this time were your records intact? A. Well, some of the cards I did not find that covered my action on mail watches and these telephone calls.

[413] Q. Do you have any explanation for the absence of these cards? A. No, sir.

Q. Now, getting back to these cards which have to do with the mail cover and the telephone calls, did you in fact find expenditures of Costello from the leads from those cards?

Mr. Christy: I object to that, your Honor. Let us break it down, mail watch and telephone calls.

Mr. Williams: Well, I was going to ask a broadside question first and then break it down, but I will break it down if your Honor wishes.

The Court: Yes, do it that way.

Q. Take first of all, Mr. Geissler, the telephone calls which you found when you had the case:

Did you find expenditures from those leads? A. I may have found some. I cannot identify the exact ones I found, but from what I had there I may have found some leads in there.

Q. Well, don't you have a recollection as to whether this was a fruitful and that was a fruitful source?

Mr. Christy: I think he has answered the [414] question.

The Court: I didn't hear what you said, Mr. Christy.

Mr. Christy: I said I think he has answered the question. I object to the last question.

The Court: Oh, no. Overruled.

A. Will you repeat the question?

Q. Don't you have a recollection as to whether this was a fruitful source for your investigation or not a fruitful

source? A. I cannot exactly say whether, to what extent it was fruitful. Let me put it on that basis; and as I investigated I may have developed some expenditures from those sources.

Q. But your records would show us definitely whether you did or not? A. The cards were comparable to those. They were index cards.

By the Court:

Q. Well, the point is, for instance, if you got from either a telephone tap or from a mail cover the name of John Jones who is in business some place in New York and you went there and found out that John Jones had received money of some kind in payment for [415] services or merchandise from the defendant Costello, would that be reported on your card? A. Yes, sir.

Q. Very well. That is what the question is, would those cards show whatever information you received as a result of that follow-up? A. Yes, your Honor.

Q. And is it your recollection that in some instances at least the information on the cards would show that you found expenditures by the defendant Costello? A. Yes, your Honor.

Q. Very well. But you can't tell how many or how much? A. Yes, your Honor.

The Court: All right.

By Mr. Williams:

Q. But if we could locate the cards overnight then we will have that information, is that your recollection? A. Yes, sir.

Q. Now, directing your attention to the mail cover in 1950, Mr. Geissler, did you find expenditures made by

Costello as the result of the information [416] supplied to you by the Post Office? A. Yes, sir.

Q. Did you find expenditures in 1950? A. Yes, sir.

Q. From the mail cover? A. Yes, sir.

Q. And you received information from the Post Office on a monthly basis or on a weekly basis? A. Periodically. I cannot say whether it is monthly or weekly. Periodically I watched places down there and we received reports from the Post Office.

Q. Was it your practice to assign some men or do it yourself, namely, go out and interview addressors? A. Yes, sir.

Q. Was this a fruitful source of investigation? A. It was fruitful but to what extent I cannot say.

Q. Well, the question I addressed to you, Mr. Geissler, is will your records show precisely how fruitful it was? A. Yes, sir.

Q. Now, the fact is that the mail cover was kept on during the life of the investigation, was it?

[417] Mr. Christy: I object to that.

Q. So far as you know.

The Court: What?

Mr. Christy: I object to his leading the witness. He can ask him—

The Court: Overruled. Go ahead.

A. Will you repeat the question?

The Court: The question is was the mail cover kept on from the time you first ordered it on throughout the investigation as long as you work on it?

The Witness: Yes, sir.

Q. And you worked on it from 1953? A. Yes, sir.

Q. That is up to the time it went to the grand jury? A. Yes, sir.

Q. Now, is it likewise true that in 1951 the mail watch produced leads for expenditures? A. Yes, sir.

The Court: Produce leads for what? I didn't hear it.

Mr. Williams: Expenditures I said, your Honor. Leads to expenditures by Costello.

The Court: All right.

[418] Q. Now, was the mail cover on both at Port Washington and in Manhattan in 1951? A. My recollection is that it was on both addresses.

Q. Now, are you able to tell us what expenditures were uncovered in 1951 from the mail cover? A. I cannot tell you exactly what expenditures were uncovered.

Q. Was the same thing true with respect to 1951 as 1950, that your records if available will show that? A. They would show, yes, sir.

Q. Do you know in whose custody these records were left when you no longer worked on the case? A. Well, when the case was reassigned to Mr. Leath, I turned over all my records and a sizeable number of cards to Mr. Leath covering the various toll calls and mail watches and things that I had received.

Q. Let me ask you about those cards so that I will understand it: They were cards similar to the cards which had been shown here as Defendant's Exhibit C and called plant cards, is that correct? A. Yes, sir.

[419] Q. They are what we call library cards in general parlance? A. Yes, index cards.

Q. Index cards? A. Yes.

Q. As I understand it you made a card out for each address that you would get from the Post Office, is that right? A. Yes, sir.

Peter F. Geissler—for Defendant—Direct

Mr. Christy: I was just going to say that during the recess I asked Mr. Geissler to what he was referring. Mr. Williams had asked him earlier, and he told me these cards he was talking about. I have a file which I think has three cards in it here if he would like to refresh his recollection with it.

Q. How many cards were there, Mr. Geissler, on this, approximately? A. I would say approximately from the time—it must be about 50 or 75 cards.

Q. Well, see if I understand you. I understood your testimony was that when you got an address from the Post Office as a result of the mail watch that you would make a card out, is that right? A. I prepared a card, yes, sir.

[420] Q. And then in orderly investigation fashion you would go out and interview the person whose name was on that card, or you would have someone do it, right? A. Yes, sir.

Q. And the card would reflect the result of the investigation, right? A. On the reverse side of the card I would make a memorandum of what action or what the disposition was in that particular case.

Q. So there should be a card, should there not, for each address which was furnished you by the Post Office? A. Yes, sir.

Q. Well, now, there were cards prepared in 1950, right? A. Yes.

Q. 1951? A. Yes.

Q. 1952? A. To May of 1952, until the case we reassigned to Mr. Leath.

Q. Now, does that refresh your recollection that there were more than 60 cards prepared? [421] A. There could have been more. At that time I was conducting a number of investigations, about four or five investigations, and I prepared a card, I followed the same investigative procedure for each party that was the object of investigation.

I kept them in a long box in a file. I got Mr. Costello's—I prepared a card for Mr. Costello or the other taxpayers, and when the case was reassigned to Mr. Leath I turned these cards with respect to Costello—there may have been more, sir; it is my recollection there were about 75 cards. Some had been completed and some had not been completed.

Q. Now, did you ever take that information as contained in those cards and transmit it to a report of some kind, summary report? A. I don't recall transmitting it to any—

Q. So the card would be both the original and the file record? A. I might have made an analysis of the disposition of the expenditures uncovered from these cards, but I cannot testify on that.

Q. And the same thing I take it would be true of the telephone cards? A. Yes, sir.

[422] Q. And when you inherited the telephone cards were they likewise on these what you call index cards? A. Yes, sir.

Q. How many of those were there? A. It is hard at this point—it is five years ago—it is hard at this point for me to say exactly how many cards. Let me say there was a sizeable amount of cards there.

Q. Now, did you perform in the same fashion with respect to the telephone cards as you perform with respect to the mail cover cards? A. Yes, sir.

Q. In other words, it was run the same way, is that right? A. Yes.

Q. So the back of the telephone cards would reflect the disposition of that investigative week? A. Yes.

Q. Now, when was the last time you saw any of these cards? A. I transferred the cards to Mr. Leath—

The Court: No. When was the last time you saw them. Was it this year or last year or when?

[423] The Witness: It was—I would estimate at the close of the investigation by the special agents assigned to the case.

Q. Well, since Mr. Christy has called you back here as a witness in this case have you seen any of the cards? A. I have seen a few of those cards.

Q. Who has them? A. Mr. Christy.

Q. And those are the only ones you have seen? A. Yes, sir.

Q. How many have you seen of those that you have already described, both mail cover cards and telephone cards? A. Oh, approximately ten.

Q. You have seen ten, is that right? A. Yes.

Q. Were they telephone cards or were they mail cover cards? A. I believe they were a combination of both.

Q. Some of each? A. Yes.

Q. And that is all you have seen? A. Yes, sir.

[424] Q. Have you asked at any time, sir, for your cards in this case? In preparation for testifying? A. I inquired as to where the balance of the cards were?

Q. What information did you receive? A. That they were not available right at the time that Mr. Christy called me back.

Q. From whom did you get the information that they were not available? A. Well, I discussed the matter with Mr. Leath also and I acquainted him with the cards that I had prepared and he said the file did not disclose them.

Q. Now, was the rest of the material so far as you know that were gathered together in the normal investigation of this case kept? A. I believe they were.

Q. So far as you know the only thing missing are these cards? A. No, I cannot testify to that. I know—

Q. Is there something else missing? A. I don't know if anything else is missing.

Mr. Christy: I object.

The Court: Yes.

Peter F. Geissler—for Defendant—Direct

Q. My question was, Mr. Geissler, in so far as you [425] know the only t' ' g missing are these cards? A. I don't know, Mr. Williams.

Q. Well, now, Mr. Geissler, who other than yourself followed up these mail cover and telephone leads and made out these cards, these particular cards? A. Well, when the case was assigned to Mr. Leath I turned over these cards to Mr. Leath.

Q. Excuse me. Did Mr. Sohn do likewise? A. He may have. I don't know.

Q. Well, maybe I should ask you in this way:

Keeping these index cards was not a habit or custom peculiar to you? It was—it is standard special agent's form of investigation, is it not? A. I don't know what the others—whether they followed that procedure.

Q. Well, in other words, it is not the regular Bureau of Internal Revenue procedure? A. I adopted that procedure of keeping cards as a simplified way of keeping a record of these various—

> The Court: Yes, but the point is, is there any regulation by any superior of yours that you should do that or did you do that merely as a matter of your [426] own discretion?
>
> The Witness: I did it at my own discretion.

Q. Your predecessor did the same thing in this investigation, is that right? A. I don't know what he did.

Q. Well, you inherited from him these same cards? A. I didn't inherit any cards from my predecessor.

Q. I understood you to say there were cards at the time you took over the file? A. No. There were a list—listings, but no cards were in the file.

Q. Listings of telephone calls? A. Yes, sir.

Q. Made on Costello's wire to other persons? A. Yes, sir.

Peter F. Geissler—for Defendant—Direct

Q. It was a list?

Now, is that list presently available, Mr. Geissler? A. Yes, sir.

Q. Do you have that? A. Mr. Christy has it, sir.

Mr. Williams: The defendant would like to [427] offer this for identification.

(Marked Defendant's Exhibit E for identification.)

Q. I am going to hand you what has been marked by the Clerk E for identification and ask you if that is a list to which you referred or if it was some other list or if there was another list? A. Yes, sir, that is the list.

Q. Do you know in whose handwriting that is? A. It appears to be in the handwriting of Mr. Cordes.

Q. Is there anything to indicate that on there? A. I believe he has his signature down here, S. W. C., Cordes. I cannot make out—he has his initials down there.

Q. Now, in addition to these telephone calls did you receive other telephone calls in the file when you—

The Court: Pardon me just a minute. You keep calling it calls; I understand this list Exhibit E for identification is a list of names that were received from the intercepted telephone calls, is that right?

Mr. Williams: Yes, sir.

The Court: A list of names?

[428] The Witness: Yes.

The Court: It doesn't purport to be a transcript of a conversation.

The Witness: No.

Q. Well, did you receive other names or phone numbers? A. Yes. There was a typewritten sheet in the file also.

Peter F. Geissler—for Defendant—Direct

Mr. Williams: Will you mark this Defendant's F for identification.

(Marked Defendant's Exhibit F for identification.)

Q. I am going to hand you Defendant's Exhibit F for identification and ask you if that is the typewritten list to which you referred, or if there is another one? A. Yes, sir.

Q. You say yes, sir, it is the one or yes, sir, it isn't? A. It is the one.

Q. Now, in addition to these, Mr. Geissler, did you receive a list of any other names or numbers called by Costello? A. Yes, sir.

[429] Q. What were they? A. They were secured from the Department of Investigation.

Q. Had they been secured before you took the case over or after? A. I believe they were secured after I had been assigned to the case. They were—now, they were secured after I had been assigned to the case.

Q. Before I get to that, I was addressing myself specifically, Mr. Geissler, to the names of persons or numbers which you had before you had come into the case, which leads you ran down? A. These were the only telephone numbers that I had access to prior to coming into the case.

Q. So that the cards were made on these calls by you, is that correct? A. Yes, sir.

Q. They were made before you came into the case? A. They were prepared by me.

Q. Now, prior to your coming into the case, Mr. Geissler, were there any records of names of addressors derived from the mail cover? A. Not to my knowledge.

Q. You have no recollection? A. No, sir.

[430] Q. Do you remember you told us you were the one that requested the mail cover? A. After I came into the case, your Honor.

Peter F. Geissler—for Defendant—Direct

Q. Do you know whether or not before you came in the case your predecessor had asked for a mail cover? A. I do not know, your Honor.

Q. You don't know that. As far as you know from examining the file when you took it over, you did not discover any names which, as far as you could tell, came from a mail cover? A. That's right.

The Court: Very well. All right.

Mr. Williams: I am going to pass those because I would like to study them overnight, if I may.

By Mr. Williams:

Q. Mr. Geissler, when was it that you got telephone numbers from the Commissioner of Investigation's Office? A. That was, I judge, during the latter part of 1950—probably during '51, 1951.

Q. '50 and '51? [431] A. Mostly '50—'51, pardon me.

Q. Who was the commissioner of investigation? A. I believe Mr. Murtagh was commissioner at that time. I am not certain.

Q. Murtagh? A. I believe so.

Q. Did you get cards from him showing calls? A. Yes, sir.

Q. How many cards did you get from him? A. I got the cards showing the calls made from Mr. Costello's phone number.

Q. Both from his apartment in New York and from his home at Sands Point? A. Yes, sir.

Q. And they were on some kind of index cards, were they? A. They were on a regular index card.

Q. And did you follow the same routine? Did you investigate those persons who were local and assign to other agents outside of New York those which were foreign? A. Some of those we investigated.

Q. Yes. You investigated them locally; is that right? [432] A. Well, if the call had been placed from his Sands Point residence into New York, it would have been a toll charge and I would have investigated it or checked it; or, if it was a call from his home address to a toll charge, it would also be investigated either in this district or other districts.

Q. Did you have within your bailiwick both Sands Point and Manhattan? A. Yes.

Q. Did you also investigate calls that were made from his apartment in New York to other persons in New York City? A. Well, there were no calls from his apartment in New York. These cards from the Commissioner of Investigation covered toll charges.

Q. Did they also have local calls in those cards? A. I examined those cards and there were no local calls on them.

Q. Well, what is your recollection apart from your examination on that subject? When did you examine these records? A. I examined them in Mr. Christy's office about 10 days ago.

[433] Q. These were records which purported to be what? A. Files from the Commissioner of Investigation.

Q. And you say that the records in Mr. Christy's office were toll calls? A. Yes, sir.

The Court: What he said is that those records which purported to be from the Commissioner of Investigation's Office covered toll calls.

Mr. Williams: I am asking him now, if I may, your Honor, what his recollection is—

The Court: My problem is not with what you asked him but with what you are saying. In other words, you a couple of times have made statements in your questions which seem to be a little inconsistent with my recollection of what the witness actually has said.

Now, we have it that he got cards from the Police Department or he got cards with names that came from the Police Department. Then he had cards with names that came from the mail cover. Now we have it that he got cards bearing names from the office of Commissioner Murtagh, and he has said that, with respect to the latter cards, they covered only toll calls to [434] Costello.

The Witness: From Costello's home, your Honor.

The Court: From Costello's home?

The Witness: Yes, your Honor.

Mr. Christy: Excuse me, your Honor. I think your Honor mentioned the New York City Police Department. I don't think there has been any testimony about cards or information from the New York City Police Department from this witness.

The Court: Well, maybe they weren't. I thought that he had said that he had gotten cards with names which he got from tapped telephone conversations.

Mr. Christy: No, I don't think so, your Honor.

The Court: Maybe not.

Mr. Christy: I am quite sure he hasn't said that.

By Mr. Williams:

Q. Didn't you get in 1951, Mr. Geissler—didn't you get records of local calls from Mr. Murtagh's office? A. No, sir.

Q. You didn't get any local calls? [435] A. No, sir.

Q. By "local call" I mean a call made within Manhattan, for example. A. In my investigations of the case, I went down to Mr. Murtagh's office to see if they had any information or any telephone calls on these various people that I was investigating. Before I talked to Mr. Christy it was my impression that there were local calls on the cards, but on examining those cards and other cards I found that the calls listed on the files of Mr. Murtagh's Department of Investigation comprised totally toll charges.

Q. You say before you talked to Mr. Christy your impression was that you had found local calls in Murtagh's office? A. It was my impression.

Q. By your impression, do you mean your recollection? A. You can put it on that basis.

Q. And Mr. Christy persuaded you that there were no— A. He didn't persuade me. He did not persuade me.

Q. But after talking to him your opinion changed [436] on that. A. It did not change. The cards indicated that they were toll charges, and my impression that they were local cards was erroneous. He did not persuade me.

Q. Did you have all the cards when you re-examined them? A. I had the cards. I felt, going through the dates that these toll charges were compiled, I felt that all the cards were there.

Q. And are those cards now available? A. Yes, sir.

Q. And what is your impression now, sir, with respect to whether all the cards are there or not? A. My impression is that the cards were there and they were restricted to toll charges.

Q. Do you have any records yourself, Mr. Geissler, which will show what calls you saw or what calls you made records of when you used Commissioner Murtagh's office as a basis for your investigation? A. No, sir.

Q. You made no records at all yourself? A. I made records of what action was taken on some of these calls. I mean, if we interviewed the individual, [437] if it was possible to interview the individual, and I made notations or prepared cards on these particular toll calls.

Q. Are those cards available now? A. I have seen a few cards. Whether they covered the Commissioner of Investigations or mail watches is hard but only a few of those cards are here.

Q. A few of the cards? A. Yes.

Q. I am talking about the cards you made from the Commissioner of Investigation's files? A. Yes.

Q. Are some of those missing too? A. I think there are.

Q. There are. How many are present that you have seen? A. A few.

Q. By that you mean— A. Five or ten, I guess.

Q. How many did you make, Mr. Geissler, at the time? A. Cards for the tolls covering Mr. Costello's phone covered approximately 50 or 75. Probably I prepared about 20 or 30 cards covering the various [438] toll numbers which I checked out or prepared cards on.

Q. Do you have any explanation as to why these cards are missing? A. No, sir.

Q. Has any explanation been tendered to you on this subject? A. No, sir.

Q. Have you made inquiry? A. I have inquired about them.

Q. And no explanation was given as to where they are? A. That they were in the files somewhere.

Mr. Williams: Your Honor, I think, if I may suggest, sir, since we are close to the time at which your Honor would adjourn, that I probably need what records are available for the orderly examination of this witness and I understand they are going to be produced overnight.

The Court: Before the recess I want to get my own mind cleared on what the witness has told us.

By the Court:

Q. You told us when you took over the case in [439] 1950 there was a small file given to you? A. Yes.

Q. And you told us also that you ordered these mail covers and as a result of that you got certain names for which you made out cards and you followed them up in the way you have told us? A. Yes, your Honor.

Q. Then you told us also that you got these cards or lists, whatever they were. In addition to the typewritten list that you had there, you had another handwritten list in the hand of Mr. Cordes. Were they all names that were secured from mail covers? Was the list that you got from Mr. Cordes a list of names that was secured from mail covers? A. I do not know where he secured that list, your Honor.

Q. You don't know where he secured that list? A. That is right.

Q. But you had that list and then you got the list that was made up from the mail covers. Was that the typewritten list? A. I don't know whether the typewritten list was secured from toll charges. I don't know where that was secured from.

[440] Q. Those two you secured from Cordes? A. Yes, your Honor.

Q. Then in addition you had a set of cards bearing the names which you secured from the mail covers? A. Yes, your Honor.

Q. Then you have another category, being those cards which you got from Commissioner Murtagh? A. Yes, your Honor.

Q. And those were toll charges made from Costello's home? A. Yes, your Honor.

Q. You have not said that you had any list or any cards bearing names which had been received as the result of messages intercepted over the telephone by the New York Police Department? A. That is right.

Q. You did not have any of those? A. No.

The Court: Very well. All right. 10.30 tomorrow morning.

(Adjourned to 10:30 a. m., October 8, 1957.)

[441] New York, October 8, 1957;
10.30 o'clock a. m.

(Hearing resumed.)

(The following proceedings took place in the robing room:)

Mr. Williams: Judge, as a preface to what I am going to request of you I would like to say this:

I suppose the basic philosophy of our motion here is that where any litigant is guilty of an infraction of the rules there must be a penalty inflicted upon him, whether it is the Government or the defendant or whoever it may be.

Now in this particular proceeding we have a kind of difficult road to hoe, because while we have a clearly visible objective in our line of proof, and we expect and believe we can prove it, nonetheless, some of the conduits through which we hope to prove it become clogged, because by the very nature of this proceeding, we must call witnesses whose interests are adverse to ours, and some of them have [442] felt, as a matter of fact, practically all of them have felt that there is an inhibition against their discussing the matter with us prior to their taking the witness stand.

Now that was true with respect to the matter which arose in June when a mail cover came out, and then we began our line of investigation on it and we found that the Post Office employees felt that they can't discuss this matter with us because of certain postal regulations and certain rules under which they must live. Nonetheless I am quite confident that we are going to be able to show today, perhaps, that there was an illicit mail cover in this case, violative of the Federal statutes.

Now yesterday, your Honor, and I am now coming to the point of this conference, the witness Geissler was on

the stand and I was probing him concerning his records and I asked him about when his records were last intact, and he recounted those years in which he had worked on the case and in which he had access to his records, and in which he had seen them intact. Then he said he had seen them, my recollection of the testimony is, late in 1953, and I asked him whether they were intact at that time and he said [443] he was working on an altogether different facet of this matter at that time, and I asked him then what that was, and there was an objection was sustained.

Last night we got the record at eight o'clock, I guess it was, and we went over it carefully, and this was the thing that intrigued Mr. Wadden, Mr. Shilensky and me, and we called this morning a witness about whom we have had access because he feels that he is no longer under the rule that he may not talk to us, and he has had some conference with us on the theory that the facts are the facts, and wherever the chips fall, they fall, which is, I think, the right approach to this, and we asked him the question as to what if anything was done by the agents after the case had been in the United States Attorney's Office and after it had gotten into the trial preparation stage, unrelated to a tax investigation of the defendant himself, and we learned that a tax investigation, and I am using that term maybe loosely at this point was made of the prospective jury panel in this case by the agents who had worked on the case. In other words, I understand that their tax returns were probed and that this information [444] was used in screening the prospective jurors for service in this case.

Now in the light of that, your Honor, and you have been very patient with us, and I don't want to prolong this hearing, and I think we had made good progress, I think we can probably finish our case in chief either late tomorrow or Thursday, but in the light of that information I thought I should come to chambers and ask your Honor if

you would let me now ask this witness what the fact is on that matter. I didn't want to make this representation in open court, because we are not trying to embarrass anybody; we are simply trying to get the facts and not trying to make sensational allegations, but I would like to ask this witness whether this be true, and I came in because I didn't want to transgress your Honor's ruling or attempt to transgress it by repeating that question in open court without advising you this morning as to what had developed overnight.

Mr. Christy: Your Honor, first of all I think that this is completely irrelevant. Mr. Williams has made his motion on two grounds, now, one that there was illegal wiretap information, and two, that there was a mail watch which he claims [445] was in violation of Title 18.

Now, with regard to what he has just said, I am not aware of any facts which would bear on what he has stated, and I can't see that it has any position in this hearing or that it would be in violation of the defendant's constitutional rights, assuming what he said had actually happened, and we certainly do not concede that it happened. I am not aware of it.

Therefore I would oppose it, I would oppose any testimony along those lines.

The Court: Well, I think that Mr. Christy has put his finger on the difficulty that I have as to the relevance on this motion as made.

Mr. Williams: Yes.

The Court: Now I don't know whether you have given any thought to whether or not you want to further amend your motion, as you did when you learned from one witness—I have forgotten who it was back in June, who said that in addition to the various other types of investigation, there was a mail cover ordered on the defendant.

Mr. Williams: Yes.

Colloquy

The Court: It seems to me that the question [446] of any impropriety, if there was any impropriety in the selection of the jury is a wholly different and unrelated point, and I would have to rule that that was irrelevant on this motion.

Mr. Williams: I would readily concede, your Honor, that it is irrelevant to the motion as drafted. Of course, I was saying something as a preface to asking your Honor for leave on the basis of this information to add a paragraph or a sentence to our motion as it stands so that it will obviate the necessity of a hearing, if this be the fact, another hearing. If we were permitted at this time to amend it, to ask the question, I don't see that it would prolong this at all. It either happened or it didn't happen.

The Court: Well—

Mr. Christy: I was going to say, your Honor, that I don't think that this is the proper time or the proper place to bring this up.

Now with regard to the mail watch, Mr. Williams amended his papers after making certain allegations in court about a mail watch, but there was no indication from what Mr. Williams said that this was a violation of the defendant's rights or [446a] that it would possibly result in an upset of the conviction. Your Honor permitted him to amend his papers with regard to that, but I think that this motion that he makes now to amend the papers is going too far. I don't think it has any relevance to this hearing.

[447] The Court: Well, it hasn't any relevance to the hearing on the motion as now made, but certainly there is no rule to prevent Mr. Williams this afternoon from filing a new motion. At least I don't know any rules that would prevent him from filing a new motion, and, if he did, he would be entitled to have his hearing on it.

It comes down, then, to a question of how we are going to go about it. Are we going to have him make a new motion and have a separate hearing on that or will we allow him to amend this motion now and go ahead while the witness is on the stand?

I assume that this witness you are going to produce has some testimony with respect to the mail cover and this that you are going into now.

Mr. Williams: Yes.

The Court: The only reason I say that to you, Mr. Williams, is this, that we started off to go into the question of the intercepted telephone messages.

Mr. Williams: Yes.

The Court: Then we got into the mail cover yesterday and that departure from one branch to another was no fault of yours but was an accommodation because the DA's man wasn't available for you to [448] continue with the intercepted telephone calls.

I should like now to go into this right away. I would like you to finish either the mail cover testimony or the tapped testimony and then go into this question.

Now, as I say, it doesn't make any difference whether you file a new motion based on a claim of improper conduct by the prosecutor in the selection of a jury or whether you add that to this motion. I see no point in requiring the filing of a new set of motion papers. I should think that an amendment on the record, I mean, the additional ground added on the record, would be adequate.

Mr. Christy: Well, your Honor, so long as the record is clear on what basis he is making the motion. If you are not going to require him to serve motion papers, which the Government would request, then I think he has to make a full statement on the record of exactly what he intends to prove and how, if it is proved, it would have violated the defendant's constitutional rights.

Colloquy

In other words, just to make a bare allegation puts the Government in a very difficult position. I think he could serve us with amended motion papers and, [449] if the motion papers are sufficient, then perhaps during the course of this hearing we could take the matter up, but I think the Government is entitled—

The Court: Look, here is your situation as I see it: Here you have this defendant who is now out on bail, and I have ruled that the bail is going to continue until the determination of this motion. If you insist that we should go through and dispose of the motion with respect to alleged misuse of wiretaps and the alleged invasion of his rights by reason of the mail cover and then start a new motion all over again, you are going to have this question of bail endlessly coming up.

Mr. Christy: I don't insist upon that. If he is going to make the motion and since he says that the motion will be going for another two or three days, it seems to me it would be very simple for him to file amended motion papers which would give us some notice of what he intends to prove and how he intends to prove it and, if he proves it, whether it would be a violation of Costello's rights.

The Court: I see. In other words, you want a set of papers on which you can argue their insufficiency as a matter of law.

[450] Mr. Christy: Yes. I think we are entitled to those. But I would not say that we would have to have another motion. I think we can take it up during the course of this hearing.

The Court: Very well.

Mr. Williams: Your Honor, may I just say this: One of the problems with which we are confronted is that each of the agents who testifies becomes a witness on each of the facets in the case, and of course it wouldn't be prudent to [illegible] him on one facet and then recall him later on another

facet and a third facet. So I must interrogate them on all the phases of the case as we now are moving forward with it.

Now, yesterday I called Geissler because Mr. Leath had asked me to call him because he had been here for eight or nine days and he was anxious to go back to Albuquerque and, I guess more than that, his chief at Albuquerque was anxious to have him back. So I was glad to accommodate him.

He is now on the stand and I would be prepared to put in the record right now an amendment, if your Honor permits it, and then ask him the question whether this thing did in fact take place. If it did [451] not in fact take place, that is the end of the inquiry.

On the other hand, if it did in fact take place, then the question would be, I suppose, one of law as to whether that fact violated in any way the rights of this defendant to a trial by an impartial jury under the VI Amendment.

Mr. Christy: I would oppose that, your Honor. If Mr. Williams' problem is the production of the witnesses and they are agents, I will agree to have the agents available at such time as he wishes to call them.

Mr. Williams: I was only thinking of the time here so that we could keep this thing moving without going back.

Mr. Christy: The agents will be available.

Mr. Williams: May I make a suggestion, your Honor? It occurs to me maybe this would be the short and expedient way to handle it. I think in your Honor's discretion you could perhaps permit the question that was asked yesterday to be answered. If the answer from this witness, who presumably has knowledge of the facts by virtue of his answer of [452] yesterday, is in the negative, it seems to me that would be the end of the matter.

The Court: I have difficulty recalling the question that you are talking about. My recollection at the moment, and

I haven't seen the transcript of yesterday's testimony, is this: that the witness had said that he no longer worked on this Costello investigation, that he was working on another investigation. The record will show what it is.

Mr. Shilensky: Another phase of this case. He said it wasn't this prosecution.

The Court: I apparently missed that.

Mr. Shilensky: It struck us as soon as he said it and we wondered what he was doing in this case after the case had been presented to the grand jury.

The Court: Well, I think, Mr. Williams, I am going to require you to file or state rather fully on the record, whether you do it today or not. It depends on what your claim is here as to whether or not we really ought to go into it. If you are going to claim some invasion of the defendant's rights by reason of whatever fact it is you have learned, that is one thing. If it is just for the sake of adding atmosphere, a position which you disclaim [453] and I accept your disclaimer, that is another thing again. But I do think the United States Attorney is entitled to a full statement of what the claim is because he may then be in a position, or at least he will want to make his record by moving, if he so concludes, to strike that part of your motion as a matter of law.

Mr. Williams: I hasten to tell you I am not so naive as to think I can impress you with atmosphere under any circumstances.

Secondly, I would be prepared to state now, so that counsel on the other side would understand our position as fully and as early a time as possible for the record, what we understand to be the facts and what violation I believe it encompasses.

The Court: All right, you can do that. You can do it right now. Do you want some time to formulate—

Mr. Williams: I can do it now.

The Court: Do it outside on the record. We are on the record here, but this conference is here in chambers and I will allow you to make your claim right in open court.

Mr. Williams: All right.

[454] Mr. Christy: There is one matter I would like to take up with the Court.

I had a call from Henry Montague, who is the Postmaster here in New York, Postal Inspector's Office, and he advised me that Mr. Williams had served a considerable number of subpoenas on carriers and other employees of the Ansonia Post Office Station in upper New York, and Mr. Montague quite properly raises a problem that he has got six or seven of his men down here in the court house now, men who have just come off the night watch, and are scheduled to go on the night watch again this evening, and I think that that poses an unreasonable burden on these men and, if Mr. Williams can dispose of those as quickly as possible, even if he has to interrupt Geissler's testimony, I think it should be done.

Mr. Williams: Your Honor, I might tell you that we talked this morning to the superintendent of the Ansonia branch and discussed this problem with him, and we have minimized the number of men who are here and we propose to call them at the earliest time so that they can get out.

The Court: Why couldn't they be called right now out of order. If they have worked all [455] night and have got to go back to work again tonight, apart from any inconvenience to the Post Office Department, these fellows ought to be allowed an opportunity to get a bath and some sleep.

Mr. Williams: Fine. We can do that. I think they were called for 11 o'clock.

Mr. Shilensky: It is almost 11 now.

The Court: It is almost 11 now. I think you ought to do that and get them out of the way.

My copy of the minutes will be out on the bench, I imagine, and, when we come to Geissler, I wish you would indicate where that is on the record.

Mr. Williams: There is an error in the record in transcribing the exact statement that was made, but it is readily visible.

Mr. Christy: We will check it.

Mr. Williams: It is page 412.

(The following proceedings took place in open court:)

Mr. Williams: I am not sure whether your Honor intended for me to make the statement now as to the proposed amendment or to proceed with the calling of witnesses.

The Court: Well, in view of the fact [456] that these men that are on call now have worked all night and have to get back on their job again tonight, I think we ought to call them right now and let them get away so they can get some sleep.

Mr. Williams: Would you call Mr. Hines, please.

The Court: The record will show that the witness now being called is being called out of order. The witness on the stand was Peter F. Geissler. The direct examination of Mr. Geissler had not concluded; is that right, Mr. Williams?

Mr. Williams: That is right.

The Court: You had not concluded your direct examination of Mr. Geissler?

Mr. Williams: No.

The Bailiff: Mr. Hines is not here.

Mr. Williams: Would you call Mr. Chwostowski?

The Bailiff: He is not here.

Mr. Williams: Your Honor, Mr. Wadden tells me some of these men wanted to sleep a little bit and they were told they could be here at 11 and 12 o'clock.

Is Mr. Pignatoro there?

[457] The Court: These are your witnesses. Go in the room and call the list and see if any of the men you want are there.

(Mr. Williams leaves courtroom and returns.)

Mr. Williams: Call Mr. Norgalis, please.

STANLEY W. NORGALIS, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Would you state where you live, Mr. Norgalis? A. Beg your pardon?

Q. Would you state where you live? A. 58-27 79th Street, Elmhurst, Long Island.

Q. How long have you lived there? A. Eighteen years.

Q. Where are you occupied? A. Ansonia Station.

Q. When you say the Ansonia Station, do you mean the Ansonia Station of the New York Post Office? A. That's right.

Q. Where is that, sir? A. 1990 Broadway.

Q. Does that post office have within its jurisdiction the area 72nd Street and Central Park West? [458] A. That's correct.

Q. Does it have within its jurisdiction an apartment known as the Majestic Apartment? A. That's true.

Q. Mr. Norgalis, what is your exact occupation at the Ansonia branch? A. I am a clerk and distributor.

Q. By that do you mean that you actually sort the mail at the branch? A. I do.

Q. Are you familiar with the routine known as a mail watch? A. I have, yes.

Q. How long have you been at the Ansonia branch? A. Well, I started there in 1935 as a temporary. Then I

was sub-carrier and then a regular. I have been there since '41, 16 years.

Q. What do you do, Mr. Norgalis, when you sort mail and come across mail on which there is a watch? A. You pick it up and give it to the supervisor.

Q. Do you set it aside separate and distinct from the mail which is being sorted? A. You usually do. You leave it on the ledge or [459] take it to the supervisor and call his attention to it.

Q. On the night watch, is that mail put on a separate table? A. It is usually called to the attention of the supervisor and it is left on his desk.

Q. And then what becomes of this mail? A. Beg your pardon?

Q. What becomes of this mail that is set aside? A. It is called to the supervisor's attention and usually there is a tracing form that he puts the identification on it, and after, like, say, in the morning after the tour, it is turned over back to the carrier for delivery.

Q. You say "after the tour." What do you mean? A. When it is ready for delivery in the morning, it is turned over to the carrier.

Q. The general practice is to set aside this mail and at the end of your night shift it is picked up or you put it on what you call— A. No. If you come across it and the supervisor is there, you give it to him. That is what you generally do.

Q. When you say there are tracings made of it, what do you mean by that?

[460] Mr. Christy: Your Honor, I would object to any further testimony unless it is related to a mail watch on Costello, and this man has knowledge of it.

The Court: No, I will allow it. He is developing what the general practice is. The man says he is familiar with the practice. I will allow him to testify as to that.

By the Court:

Q. Did you ever do any tracing yourself? A. Well, yes, I have.

Q. Have you done any tracing at the direction of the supervisor on mail on which there was a watch? A. Yes. Well, not in this particular one, no, sir.

Q. No, in any case. A. Yes, I have.

Q. So that you are familiar with what the process of tracing is? A. Yes.

The Court: All right. Go ahead.

By Mr. Williams:

Q. Do you recall a mail watch on the mail of one Frank Costello? A. Yes.

[461] Q. And that was Frank Costello at 115 Central Park West? A. That is right.

Q. Do you recall for what years it was on? A. Well, offhand I can say about four years ago, I presume, or about that. I just can't say offhand. It is quite some time.

[462] Q. Now, do you recall tracings being made on his mail? A. Yes, sir.

The Court: When you say four years do you mean about 1953?

The Witness: About that, sir, I guess.

The Court: All right.

Q. Was it as long ago as five or six years ago? A. I can't recollect that long.

Q. Did it last over a long period of time? A. That I wouldn't know.

Q. When you came upon this mail when you were on your shift did you set it aside for tracing? A. Well, to be frank with you, I usually am the city distributor. I didn't work on up mail, we call it, itself, but there usually was a record of it. Usually a letter on the case, so and so's mail, there is a watch on it; hold it aside.

Q. When you say tracings were made do you mean that an actual trace was traced over on some kind of tissue paper? A. No. You usually have a paper. I can't tell you the name of it, to tell you the truth. It is a sheet of paper and you put the name of the individual. [463] It is usually put on top, and there is lines there that you trace that name by saying where is it from, where is it going to, where is the addressee, who it was addressed from and the address, and the post office. That is all.

By the Court:

Q. Well, what you are saying is if a letter was addressed to this defendant Frank Costello. A. Yes.

Q. And there was a watch on that mail, you would pick up that letter? A. Yes, sir, your Honor.

Q. And you would look at it? A. Yes.

Q. And you would see if the name of the sender appeared any place on the envelope, is that right? A. Yes, sir.

Q. Then you would write that name and the address, the name of the sender and the address of the sender on this sheet of paper that you had? A. Yes, sir.

Q. And you would also write that it was a letter addressed to the defendant Frank Costello? A. Yes.

[464] Q. Now did you do anything else with it? A. Sir—well, later we turned it—well, after it was completed we brought the letter back to the supervisor.

Q. Yes? A. And he in turn said to take it back to the carrier on the route for delivery.

Q. Is there any practice or process by which you take a letter addressed to the defendant Frank Costello and put a piece of tissue paper over it and trace out the form of the writing? A. Not to my knowledge.

Q. Very well. So when you talk about tracing you don't mean tracing in that sense? A. I don't quite understand, your Honor.

Q. Just a moment, please. You don't mean tracing in the sense of putting on tissue paper and copying out the form of the writing on the face of the letter? A. No, your Honor.

Q. You merely make a record of the name and address of the sender and the name and address— A. On a piece of paper.

Q. Of the person to whom the letter is sent? [465] A. Yes.

The Court: Very well.

By Mr. Williams:

Q. What would you do with the mail when it had missed its regular delivery as a result of—

Mr. Christy: I object to that question, your Honor.

(Last question read at the request of the Court.)

The Court: Sustained. You had better clarify that.

Q. Were these occasions when the carrier would have gone out on the morning rounds before the tracings were made? A. Well, I really wouldn't—as far as I knew the mail that was traced would go out, as far as I know.

Stanley W. Norgalis—for Defendant—Cross

Q. You didn't yourself give it to the carrier, is that right? A. Yes, I would give it to the carrier and he would box it up into the particular route number, whatever it is.

Q. He would box it up? A. Well, he would box it up, yes, as we would [466] call it.

By the Court:

Q. By that you mean he would put it in the place where he laid out the mail, street A and street B? A. Yes.

Q. House A and house B and so on? A. Yes.

Q. The way the letter carriers do? A. Yes, your Honor.

Mr. Williams: That is all, your Honor.

The Court: Let me ask a question here.

By the Court:

Q. Where there was a mail watch it wasn't part of the practice or was it part of the practice and was it any part of your duty to open the mail? A. No, your Honor.

Q. You didn't open any letters in this tracing process? A. No, sir.

Q. You did no more than you just told us? A. That is all, your Honor.

The Court: Very well.

[467] *Cross-examination by Mr. Christy*:

Q. Were you a carrier? A. Clerk.

Q. In other words, you never carried mail to the Costello residence? A. No, I never did.

Q. Was it your job to separate the mail when it first came into the post office? A. Well, I would call it boxing up the mail.

Q. Do I understand you put it in the individual boxes? A. Yes, that is right.

Q. For each address? A. That is right.

Q. And as you were doing that if you came across a letter to Costello you would withhold that? A. That is right.

Q. And then you would give it to the supervisor? A. I would.

Q. And he would make what you called a note of the addressor? A. Yes.

Q. And perhaps the postmark? A. Yes.

[468] Q. And then it would be put back in the box? A. It wouldn't be put in the box. I would give it to the supervisor. He would have it, make a note of it, and either he would tell me to give it to the carrier on the route, which one of us would do, because there were several persons doing that.

Q. So there was no delay? A. There was no delay.

Q. By reason of the tracing? A. No, sir, that is right.

Mr. Christy: That is all. No further questions.

Mr. Williams: I think we probably have to go forward with Mr. Geisler until the witnesses who will prove this sequence come. It will only mean a delay of about 30 minutes.

The Court: Now, that raises the question that you discussed in the robing room. If you are prepared now to make that claim and your application is to amend the motion, why, I will hear you now.

Are we through with this witness?

Mr. Williams: Would your Honor indulge me one moment?

(Mr. Williams confers with associates.)

[469] The Court: Are there any other men in there that come within this category?

Stanley W. Norgalis—for Defendant—Cross

Mr. Williams: No. We are going to let them go. We can't use them, but we have a couple coming in order to prove the sequence.

The Court: Well, it seems to me—the confusion is my own apparently. I thought you had the men here from the Ansonia office whom you intended to call and have testify with respect to the tracings such as this man testified. Now if they are here I want them called now.

Mr. Williams: Yes, sir.

The Court: So that they may get on and go on back to their work. Otherwise they would have lost this time this morning for no purpose and they will have to be called back at another time.

Mr. Williams: There are only a couple. They are being excused and we are ready to go forward with Mr. Geissler.

The Court: Wait a minute. Are you representing to me that you are not going to call these men again?

Mr. Williams: That is right, your Honor, because we have cumulative proof here, and I want to [470] put it in in orderly sequence, and I can do it because certain witnesses were excused. So that they would not have to be here until 11:30 or 12 o'clock. It is cumulative proof. I think there are three or four people out there and they are being excused, to accommodate them. If we need them we will have to call them.

The Court: Well, that is exactly—

Mr. Williams: But I am excusing—

The Court: But if you call them back again, Mr. Williams, you are going to be violating a direction that I have just given.

Mr. Williams: Then I shall not.

The Court: Now I want the names of the men you have called whom you are now excusing. Put them right on the record.

Mr. Williams: Mr. Wadden will bring those names in in a moment.

The ones who are being excused, if your Honor please, are Scher, Cohen, Solomon and Cooke.

The Court: And those are all employees of the Ansonia office?

Mr. Williams: Yes.

The Court: Were they called for the purpose [471] of testifying about matters that the last witness has testified to?

Mr. Williams: They were called for that purpose, your Honor, but they had no knowledge of the watch on this particular defendant, and I want to put that in in orderly sequence and I do have witnesses coming on that.

The Court: All right.

Who is your next witness?

Mr. Williams: Mr. Geissler.

The Court: Very well.

Mr. Williams: Does your Honor want me to put on the record now the proposed amendment?

The Court: If you desire to go into that with this witness.

Mr. Williams: Yes.

It is our contention, if the Court please, based upon information which we have received since the witness Geissler was last on the stand, as a result—

The Court: Please. I don't want argument, Mr. Williams. I understood that you were now going to move to amend your motion in certain respects. You may now make your motion to amend.

[472] Mr. Williams: The defendant alleges that he was deprived of the right to an impartial jury

within the purview of the VI Amendment to the Constitution by virtue of the fact that the prospective jury panel was screened prior to the trial by having their income tax returns made available to the agents who were working on this case.

Defendant alleges that the practice engaged in produced a jury which did not represent a true cross-section of this community and that it was in effect a blue ribbon jury.

The Court: I don't know what you mean by a blue ribbon jury but I suppose some time in the course of the argument you will explain that.

Mr. Williams: Yes, sir.

The Court: All right. The motion will be deemed amended, so that the motion now is that the defendant's rights were violated or the conviction is affected:

1) Because of the alleged use of information obtained from the tapping of the defendant's telephone,

2) By the use of the mail cover; and now

3) Your motion is that he was deprived [473] of an impartial jury by reason of the screening of the income tax returns of the members of the panel.

Mr. Williams: Yes.

The Court: Very well.

Mr. Christy: May I be heard?

The Court: You may.

Mr. Christy: Your Honor, the Government would oppose this amendment to the motion that has heretofore been made. In the first place, Mr. Williams has merely alleged, as far as I can see, on some belief or suspicion that has come to him that the tax returns were available to—tax returns of prospec-

tive jurors, I guess he means, were available to the Government.

Under the law, of course, tax returns of anybody within the district are available to the Treasury agents. There could be no question about their being a blue ribbon jury. Your Honor is familiar with the system of picking juries and panels of juries in this court. There is no such thing as a blue ribbon jury in the Federal District Courts, and I don't see that Mr. Williams has alleged anything which could conceivably, assuming it were true, which we do not admit, be a violation of the defendant's [474] constitutional rights or any other rights.

Further, I don't think that the issue which he has raised here is, as I said, germane to the particular issues at this hearing, and I would oppose the motion to amend his papers to include this recent allegation that he has made.

The Court: I will allow the amendment of the motion. So that there isn't any mystery about it, the matter was first brought to the Court's attention this morning by counsel in the presence of the United States Attorney before we entered the courtroom, and the purpose, Mr. Williams made it plain to me and to you, was this: He believes that the witness presently on the stand, who is an agent of the Internal Revenue Department stationed at Albuquerque, New Mexico, has information with respect to this phase of the case which Mr. Williams now wishes to raise, and he thought that it was more appropriate to bring out whatever evidence this man may have while he is here rather than have the man go all the way back to New Mexico and then bring him back here on another trip in order to testify about this screening of the jury.

Stanley W. Norgalis—for Defendant—Cross

The defendant and his counsel can make as many motions as they think are appropriate. There is no [475] reason why this motion could not be made separately; there is no reason why it should not be made now, because it will be easier and more convenient to hear all of the testimony that this witness has to give while he is here rather than send him away and bring him back.

So merely in the interest of economy of time I have decided to allow the motion to be made.

Now, the fact that Mr. Williams does no more than make the charge and does not support it now by affidavit I think is not a very serious objection, because, as I understand the rules, it is no longer necessary to support a motion by affidavit unless the Court so directs.

Under the rules a man can make a motion merely by filing a sheet of paper and say, "I move for the following reasons," and I am not going, in the exercise of my discretion, to require Mr. Williams to support his motion by an affidavit at this time because he proposes to begin now to bring out the facts which he thinks will establish the claim that he has now made, partially through this witness and probably later through other witnesses.

So the motion Mr. Williams now makes to [476] further amend his original motion is granted and we now have, as I said before, three prongs: One, the challenge based on the alleged use of the tapped telephones; two, the use of the mail cover; and now the whole separate claim that the defendant was denied trial by an impartial jury because of some alleged misuse of the income tax returns of those persons who appeared on the panel.

All right. Now go ahead.

Peter F. Geissler—for Defendant—Recalled—Direct

PETER F. GEISSLER, resumed.

Direct examination continued by Mr. Williams:

Q. Mr. Geisler, yesterday when I was interrogating you I asked you whether or not you had seen your files as late as 1953; do you recall that? A. Yes, sir.

The Court: Pardon me just a minute now. There was a place where this occurred in the record you were going to call to my attention. This has to do with that objection that I sustained.

Mr. Williams: Yes, your Honor.

The Court: Which you think foreclosed you from going into the matter which would now be relevant under your present motion.

[477] Mr. Williams: Yes, sir.

The Court: Where did that occur?

Mr. Williams: At page 411 I asked the witness:

"Well, now"—and this is at the bottom of the page—"you stated at the time the case left the special agent's office and went to the United States Attorney's office your records were intact. Then I asked you if you did some work on the case after it got to the United States Attorney's office.

"A. It hadn't. It had nothing to do with the records that I prepared, the work I did in the U. S. Attorney's office."

My question was, your Honor, what did that work have to do—

The Court: What did that office have to do with it.

Mr. Williams: I think that is a misstatement of my question. That is what I said to your Honor in the robing room, that it is not an accurate transcription of the question that I asked.

The Court: Well, who was the reporter who took it?

[478] The basis of the ruling was you asked what did that office have to do with them, namely, the records. Just a moment, please. The context is this: "you stated at the time the case left the special agent's office and went to the United States Attorney's office your records were intact." The context in which that question occurred was a series of questions by you to ascertain whether or not the last time the witness had seen his index cards and other records they were in the same condition they were when he had worked on them and prepared them. There was some discussion, as I recall it, by the witness or some statement by the witness that recently, in this year, when he had seen the records he found that they were probably not as complete as he thought they should be.

So what we were going into at that time was the question of his records being intact. So you stated, when your records went to the U. S. Attorney's office they were intact.

"Then I asked you if you did some work on the case after it got to the United States Attorney's office.

"A. It hadn't. It had nothing to do with [479] the records that I prepared, the work I did in the U. S. Attorney's office."

Then the question is:

"Q. What did that office have to do with them?"

Pardon me just a moment. Don't shake your head at me, Mr. Williams. I am reading what is in the transcript.

And at that time, since it seemed clear to me as a matter of law that it was not relevant on this mo-

tion for you to inquire of the witness what the United States Attorney had done with the records that he said he had turned over to them, I sustained the objection.

There is no point now, it seems to me, in making a great issue as to whether these reporters, whose competence has been demonstrated time without end, should have so completely miswritten what you say is in fact your question.

You are now desirous of going into what this man did in connection with the screening of the prospective jurors. You may do so, but the record will not be corrected and I rule that the question is stated in the transcript as it actually was asked.

You may proceed.

[480] *By Mr. Williams:*

Q. Mr. Geissler, in 1953 you testified that you did some work in this case that had nothing to do with the records that you prepared; is that correct? A. That's right, sir.

Q. What was the nature of that work?

Mr. Christy: I am going to object, your Honor.

The Court: Overruled.

A. I was assigned to a surveillance. I had a surveillance assignment for about two weeks and I did miscellaneous work in the U. S. Attorney's office for a few weeks.

Q. What was the nature of the work that you did on this case?

The Court: Just a minute. If you want to go into the surveillance, you may, but I am not going to have this man take up our time here by saying everything that he did. He said he did surveillance and he did some other work.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. Did you at any time, Mr. Geissler, screen the income tax returns of prospective jurors? A. I did.

Q. Would you tell us what you did in that respect?

[481] Mr. Christy: Objection, your Honor.

The Court: Overruled.

A. I was directed by Mr. Murphy to contact the various districts in which the prospective jurors—

The Court: First of all, were you given a list of the panel that had been summoned from which a jury was to be drawn for a trial?

The Witness: I had not, your Honor.

By the Court:

Q. Did you get a list of names from Mr. Murphy? A. Mr. Murphy directed me to the office of the various Internal Revenue districts and instructed me to examine these income—certain income tax returns.

Q. That is what I am trying to find out. Did he give you a list of names? A. He did not, your Honor.

Q. Did he just say, "Go and examine all the returns in that district," or did he say, "Examine the returns of A, B, C and D," giving you names? A. When I reported to the district, these returns were made available to me, a certain number of returns.

Q. You were told to go to a certain office and [482] examine returns that would be made available to you? A. Yes, sir.

The Court: Very well.

Peter F. Geissler—for Defendant—Recalled—Direct

By Mr. Williams:

Q. How many returns did you examine, to the best of your recollection? A. To the best of my recollection, I examined approximately 150 income tax returns.

Q. Were you told that these were income tax returns of prospective jurors? A. It was indicated to me that they were prospective jurors.

Q. Who indicated that to you? A. I believe Mr. Murphy did.

Q. Is that Mr. Murphy who was an agent assigned to this case? A. Yes.

Q. What is his full name, sir? A. John R. Murphy.

Q. What kind of an investigation or examination did you make on those returns, sir? A. Well, I examined the return, I ascertained the type of business that the taxpayer was engaged in, his marital status, his source of income, the amount of [483] his income and the tax paid and if there was a refund in connection with the particular income tax return. If he filed the long form, I examined the deductions that he had taken and made appropriate notations relative to anything that was unusual or appeared to be unusual.

Q. When you say you made appropriate notations, Mr. Geissler, do I understand correctly that you made a report on your examination of each of these returns? A. Yes, I did.

Q. What districts do you refer to when you say you went to various districts to examine returns? A. I examined the returns in Lower Manhattan—at least that is to my recollection—Upper Manhattan, and I recall going to Albany, New York, to examine a number of returns up in Albany.

Q. Were the returns that you examined all in districts within the Southern Judicial District of New York? A. Yes, sir.

Q. They were? A. Yes, sir.

Q. I am sorry, I don't recall your answer to my question as to whether you made a report on these [484] various returns. A. I made a report on the returns, yes, sir.

Q. To whom did you make the report? A. I forwarded that memorandum to Mr. Murphy.

Q. And was it a written report on each return that you examined? A. To the best of my recollection, for each return that I examined I made notations on a yellow pad, and I made various notations in connection with the return.

Q. And was that yellow pad annotation reduced to typewritten form? A. I don't know what disposition was made of the yellow pad after I gave it to Mr. Murphy.

Q. You simply forwarded it to him in the form of a yellow pad notation? A. Yes, sir.

Q. After you made this disposition of your work in the form of your analysis of these returns, did you ever again see these notes or these reports that you made? A. No, sir.

Q. Do you have any information as to what disposition was made of them? [485] A. No, sir.

Q. Have you ever had any information from the United State's Attorney's office as to what disposition was made of them? A. No, sir.

Q. Have you had any conversation with anybody in the United States Attorney's office about this fact? A. Not to my knowledge.

Q. You never had a conversation with anyone concerning the surveillance of the tax returns in the United States Attorney's office? A. Not to my recollection.

Q. Did anyone, Mr. Geissler, other than you, to your knowledge, perform this same service? A. I do not know, sir.

Q. As far as you know, at this time you were the only one who made an examination of the tax returns of prospective jurors? A. As far as I know.

Q. Over what period of time did you make this investigation? By that I mean how long did it take? A. The inspection of the income tax returns took approximately one day in each respective internal revenue district.

[486] Q. For what years did you examine the returns? A. I believe we examined—I believe the returns were examined for the year 1952.

Q. You only picked out one year; is that correct? A. Yes, sir.

Q. Were you directed by your superior to look for any specific thing in your examination of the returns or any specific things?

Mr. Christy: Objection, your Honor.
The Court: Overruled.

A. Well, there were no specific instructions relative to looking for a specific item but merely to inspect the return and make appropriate notations as I formerly described to you.

Q. By the "appropriate notations", you mean those things that you testified to a moment ago? A. Anything unusual relative to the return—that would appear to be unusual, and in addition to the general information on the return.

Q. When you say "anything unusual", do I understand that you mean any irregularity in the return? A. Well, it is hard to say there is an irregularity in the return merely by an inspection of it. [487] You would have to probe a little deeper into the return, but what appeared to be an irregularity I would have made a notation of.

Q. You say you spent one day in each of the three directors' offices which you described, Upper Manhattan, Lower Manhattan, Albany? A. Yes, sir.

Q. Can you fix that in point of time, Mr. Geissler? A. Well—

Q. Do you have any records which would show it? A. My diary would reflect the actual time that I spent in each office.

Q. Do you have your diary with you? A. I do not have my diary with me.

Q. Is it available? A. My diary is in Albuquerque, New Mexico.

Mr. Williams: Your Honor, I wonder if, in the economy of time, we might ask Mr. Geissler, or if your Honor would ask him to ascertain these dates for us so that he could give the Court enlightenment on the exact time.

The Court: You may ask him.

Q. Will you do that, Mr. Geissler? Can you call Albuquerque?

[488] The Court: Is it possible for you by telephone to have somebody look at your diary and give you that information?

The Witness: Yes, it is, your Honor.

The Court: Very well. Do so, please.

The Witness: In the absence of my diary, it took me one day to screen the returns—

The Court: What year did you do it in? Maybe we can get along without the diary. In what year did you do this work?

The Witness: I did it in, I believe, 1953, your Honor.

The Court: You were examining the 1952 returns, so it must have been at least after 1952.

The Witness: 1953.

The Court: 1953?

The Witness: 1953, yes.

The Court: Now, do you recall what month?

The Witness: I don't recall, sir. There would be some record of it but I don't recall specifically the month.

The Court: Do you know what part of the year? Was it the winter, the summer?

The Witness: I don't know what part of the [489] year it was.

The Court: All right.

Mr. Williams: Maybe this would help him, your Honor.

By Mr. Williams:

Q. Can you fix it in relationship to the time of the trial in this case? A. It was prior to the trial of the case.

Q. I understand that, but can you fix it in point of time with respect to how long prior to the trial? A. I cannot fix it in the absence of my diary. I cannot fix it.

The Court: When did the trial commence?

Mr. Christy: It commenced on April 5, 1954, as I recall, your Honor.

The Court: Very well. Does that date help you?

The Witness: I cannot state whether I did it in the '54 year or late in the '53 year, your Honor. I can get that information for you.

The Court: All right.

Mr. Williams: Your Honor, I think perhaps it would be helpful if we had the actual reports of Mr. Geissler on this, if your Honor feels we are entitled [490] to them.

The Court: Mr. Williams, you may call for, you may subpoena any document that you think is appro-

priate, and, if the subpoena is resisted and a motion is made with respect to it, I shall try to rule on it.

Mr. Williams: Yes, sir.

By Mr. Williams:

Q. Now, Mr. Geissler, when you went to the offices of the director in Upper Manhattan and Lower Manhattan and the director in Albany, had those returns already been pulled for your inspection? A. Yes, sir.

Q. They had been pulled by someone in each of those offices? A. Yes, sir.

Q. Do you know who it was in those offices who had in fact pulled those returns for your inspection?

Mr. Christy: Objection, your Honor, irrelevant.

The Court: Overruled.

A. I do not know exactly who pulled the returns, but I know in the Albany office I reported to Mr. Mullen, who is the chief of the Intelligence Division in Albany, [491] and he had the returns available for examination by me.

In the Upper Manhattan and Lower Manhattan districts at this date I do not know exactly who pulled the returns for me.

Q. Now, Mr. Geissler, yesterday when you were on the stand I asked you if you would have today such of your records in this case as were still extant. Do you have them here? A. I examined—I don't understand the question.

The Court: The question is this: Do you, Mr. Geissler, have with you any of the records that you told us about yesterday?

The Witness: I examined the files—

The Court: No. Do you have them?

The Witness: Yes, sir.

The Court: Where are they?

The Witness: I have two cards.

The Court: All right. That is the answer. Mr. Williams asked if you have them. If you have, you have.

By Mr. Williams:

Q. May I see them, Mr. Geissler?

Mr. Christy: I object, your Honor. These are [492] Government records and I don't think Mr. Williams is entitled to see them.

The Court: We will find out about that. Mark them for identification.

Let the record show that the witness Geissler has just handed to the clerk two cards which he took out of his pocket. Those are the cards presumably that he said were records that he had worked on when he was in the New York office.

The Witness: Those were records I uncovered in addition to those I worked on.

The Court: Where did you uncover these from?

The Witness: I was at the office of the Intelligence Division this morning and combed through the files and I uncovered these two additional cards.

The Court: These are cards, then, that have not, as far as you know, been heretofore turned over to Mr. Christy?

The Witness: Yes, your Honor.

The Court: Is it the fact that some records of the type the witness described on the stand yesterday have already been made available to the defendant?

Mr. Christy: No records have been made available to the defendant in the time between adjournment [493] yesterday and this morning.

The Court: At any other time?

Mr. Christy: Or any other date, except yesterday in court I did hand him two slips of paper which were marked for identification.

The Court: Yes, I recall that, but the witness had testified that the practice was to take a card and set up a card for every name—

Mr. Christy: That is correct.

The Court: —and any message that appeared in the telephone conversation.

Mr. Christy: No, I don't think that is quite correct. I think what the witness testified is this, your Honor: That from the slips of paper which he found in the file when he was given it and which slips of paper contained telephone numbers taken from toll charges, that from those numbers he prepared cards, apparently one card for each one of those names and numbers. I believe he also testified that he had prepared cards from the reports of the mail watch.

The Court: Yes.

Mr. Christy: In other words, he would put a note of the addressor on the card. I think he also testified that he made cards from the information he [494] received from the Department of Investigation and the toll charges that he received down there.

The Court: That is right.

Mr. Christy: Those are the cards which he himself prepared and which he used for investigation.

The Court: Which he said, I think, were turned over to the United States Attorney.

Mr. Christy: I think he said they were turned over to the Treasury Department at the time the case was referred over to the United States Attorney's office, which was some time in 1953.

The Court: Now my question is, up to the present time have any of those cards been made available to the defense either voluntarily or pursuant to subpoena?

Mr. Christy: No, sir.

The Court: Very well. Now we have it.

The Clerk: Defendant's Exhibit G for identification is John Douglas—

The Court: Mr. Clerk, I will tell you what to read out. I asked you to mark a couple of cards here. If you are going to make them available to Mr. Williams prior to my ruling there is no sense in my making a ruling.

[495] The Clerk: I will give it to the reporter.

The Court: Never mind the reporter. The reporter will say the two cards which the witness has taken from his pocket have been marked for identification. The very point you are going into now is the matter which counsel are debating with me.

(Defendant's Exhibits G and H marked for identification.)

The Court: I take it you want to see the cards?

Mr. Williams: Yes, your Honor. I would like to see these and such other cards as he described yesterday which I understood at yesterday's session were in the possession of Mr. Christy.

Mr. Christy: There are two or three cards—two cards, I think—that we do have in our possession.

The Court: Very well.

Mr. Christy: I object to the production of these cards or showing these cards to Mr. Williams. They are the work product of the witness; they are records that he himself prepared and worked on, and there is no showing that anything on these cards is [496] relevant to anything at this hearing.

He prepared a lot of cards over the period of time in which he was working, but that doesn't mean that Mr. Williams is entitled to see all of these cards. Mr. Williams perhaps may ask him questions as to what he did, but I don't think he is entitled to see all of these cards.

The Court: Well—

Mr. Christy: They can contain confidential information, other information that has nothing to do with this case or information that may have to do with other cases.

The Court: That may very well be, but would you make the same argument with respect to those cards which would clearly refer to this case? Do you make that contention with respect to every card in the file?

Mr. Chritsy: I would make that contention—

The Court: What I have in mind is this, and I am just posing this for the sake of seeing what your position is: Let us assume that a card of this kind bore the name of a person to whom at the trial it was testified the defendant had paid some money so that there was a relationship there where that [497] name came in building up what the defendant's income was in any one of the years. Would you contend that that card could not be given to the defendant on this motion where he is claiming that that particular bit of evidence stemmed from an improper use of a telephone tap?

Mr. Christy: Well, I would generally, but I think that we have got to find it a little more than that. In other words, these cards have to do with both mail watch and the calls that were on the slip of paper which he got at the time the file was given to him and which do not relate to intercepted telephone conversations.

Also, he made cards from calls made—

The Court: Mr. Christy, you have taken the position that some of these cards in all likelihood have no relevance whatever to the particular charges on which this defendant was convicted.

Mr. Christy: That is right.

The Court: All right. We will assume that there is that class of card. It would be a fair assumption, I would think, in view of the testimony so far, that some of the cards would relate to matters which you would agree were relevant. that is, the material [498] on the cards would be relevant to this case, they wouldn't be related to some other case but they would relate to this case. Now, I am trying to direct your attention to that type of card and ask you if it be your position that even that type of card should not be made available to the defendant?

Mr. Christy: May I answer it this way, your Honor. Let us assume that one of these cards contains the name of a person who was on the slip of paper that Mr. Geissler got when he got the file from Mr. Cordes in 1950. Now, Mr. Geissler prepared a card, he put the name on the card.

Now, if that person was not a witness in the trial, I certainly don't think that Mr. Williams is entitled to see it. If he were a witness in the trial, I still don't think he is entitled to see it. In the first place, they don't have anything to do with

intercepted telephone conversations; secondly, Mr. Geissler may possibly have noted information on the backs of these cards which might not—

The Court: You see, I don't know whether they relate to intercepted telephone conversations or not. I have never seen the cards.

Mr. Christy: I say they don't.

[499] The Court: All right. But suppose they do? Suppone one did?

Mr. Christy: Then he has to ask that of the witness to establish it before we can go any further.

The Court: I am not quite sure I get that.

Mr. Christy: Your Honor, these cards have absolutely nothing to do and do not stem in any way from any intercepted conversations. Now, I don't think that he is entitled to see the cards. They have no relevance in this hearing, which is on the basis of illegally intercepted telephone conversations. These are cards which he used in the regular investigation, which bore no relation to intercepted telephone conversations.

The Court: That may very well be the fact, but didn't this witness testify yesterday, and you have adverted to it in your discussion this morning, that among the cards that he had were cards made up from a list of names which he had received from the Commissioner of Investigations in the City of New York and that those names represented persons called on long distance or on toll charges from Costello's telephone?

Mr. Christy: That's right, the Department of Investigations, your Honor.

[500] The Court: And that those accounts, as I recall it—I may be wrong about this, but I understood him to say that those toll charge calls, I will call it for want of a better name, contained informa-

tion that they evidently got from the Commissioner of Investigation and contained not only the name of the person called but in some instances some part of the conversation that went on over that phone, or was it just the name of the person called?

Mr. Christy: No, sir, just the name of the person called and the number.

The Court: The number called and the person called?

Mr. Christy: That's right. And those were prepared, as the witness testified, I believe, from toll charges which were obtained from the telephone company.

The Court: Yes.

Mr. Christy: And had nothing to do with interceptions.

The Court: I see. Very well. Then it is a matter of submitting each card for my examination, I suppose, to pass on that question.

Mr. Christy: I have no objection to your [501] Honor looking at them.

The Court: Well, it looks like that is what we are going to do. We will be here for a long time.

Mr. Christy: There are only a few cards, your Honor.

The Court: All right.

Mr. Williams: May I remind your Honor that the witness testified yesterday that he made cards as a result of information gleaned from the mail cover also?

The Court: Yes.

Mr. Williams: And that some of those that were remaining were from the mail cover, some were from telephone calls and that of the great number that he had prepared, that he had seen only some—I think he said 10. I am not sure of that at all.

The Court: Whatever the witness said is in the record. It is there.

But the point now is that the United States Attorney informs me that there are only—how many cards?

Mr. Christy: I have two here, your Honor, which were contained in a file which I found in my [502] office.

The Court: Very well. And then these two that the witness brought this morning.

Mr. Christy: Plus the two that the witness has produced.

The Clerk: Shall I mark those?

The Court: Just hand them to me. I will tell you what to mark and when to say anything. Just hand them to me.

(Cards handed to Court.)

[503] The Court: Your associate was on the stand, Mr. Wadden was on the stand yesterday, Mr. Williams. He testified about a large number of calls and he had a list with him. Is that list handy for me to look at now?

Mr. Williams: Yes (handing to Court).

The Court: Did you take these chronologically, Mr. Wadden?

Mr. Wadden: Yes, sir.

The Court: Are they listed here chronologically?

Mr. Wadden: They are listed alphabetically.

The Court: Oh, alphabetically? Would you look at these two cards which are not yet marked? I think those are the two you just handed me.

Mr. Christy: There are two which I gave that are not marked.

The Court: Have them marked whatever the Government's next number is.

(Marked Government's Exhibit 1 for identification and Government's Exhibit 2 for identification.)

Peter F. Geissler—for Defendant—Recalled—Direct

By the Court:

Q. Mr. Geissler, would you look at this card [504] which is now marked Government's Exhibit 1 for identification and tell me whether or not that card was made out after you examined any of these lists that you have told us about yesterday? Now I don't want you to mention what is on the card; I just want you to tell me what was the source of the information from which you made the notations that appear on that card? A. The source of the information appearing on this card came from a mail watch, your Honor.

Q. Very well. There is some information on the back? A. That was the action taken after we had contacted the party.

Mr. Christy: Excuse me, your Honor, is that No. 1?

The Court: This is Government's Exhibit 1 for identification.

Q. Now, will you look at this card marked Government's Exhibit 2 for identification, this information, data, only on one side of it and just tell me the source of the information, the source from which you received the data which appears on the face of that card? I mean the typed information. [505] A. I cannot tell you exactly the source of this information, your Honor.

Q. Very well. Do you know anything at all about the script that appears on there, the handwriting? I mean, did you make it? A. I did not make this inquiry. This inquiry was made—

Q. By somebody else other than yourself? A. Yes, sir, your Honor.

Q. And whatever is written there in handwriting is not your handwriting? A. It is not, your Honor.

Q. Very well. Now, Defendant's Exhibit G for identification which is one of the cards which you took out of your pocket this morning:

Peter F. Geissler—for Defendant—Recalled—Direct

Will you look at that and tell me where the information comes from that is typed on the card? A. This information comes from a call made from the hotel—

Q. Will you tell me what your source of information was? You are reading the card to me. A. From a telephone call made at a hotel.

Q. Well, did you listen to the telephone call? Where did you get the information from? [506] A. The hotel supplied the information, your Honor.

Q. Will you look at Government's Exhibit 8 for identification and tell me where the information that appears on that card comes from? What was the source of that information? A. The information was a call made from a hotel.

Q. Will you tell me what the source is, who was it that told you about the material or the information that appears on that card? A. The hotel, your Honor.

Q. The hotel? That is the same thing that happened here. All right.

The Court: Do you wish to question the witness further in the light of the information elicited by my questions?

Mr. Williams: Is your Honor reserving ruling on the card?

The Court: Yes, I am.

Mr. Williams: Your Honor, in accordance with the spirit of your Honor's earlier ruling I have been told that one of the midnight workers is from the Ansonia branch.

[507] The Court: Well, all right. Will you withdraw for a moment, please, and let us get him in.

(Witness excused.)

William John Kowalski—for Defendant—Direct

WILLIAM JOHN KOWALSKI, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Kowalski? A. 2831 Exterior Street, Bronx, New York.

Q. How long have you lived there? A. It will be three years this month some time.

Q. What is your occupation? A. I am a post office clerk at the Ansonia station.

Q. How long have you been occupied as a postal clerk? A. Well, I was appointed January 9, 1949, sir.

Q. And how long have you been engaged at the Ansonia branch? A. I came there some time in 1952, January or February; I don't remember now; or March.

Q. Is the Ansonia branch the branch that encompasses the area at 72nd Street and Central Park [508] West? A. Yes, sir.

Q. Does that cover an apartment known as the Majestic apartment at 115 Central Park West? A. Yes, sir.

Q. Has it covered that particular area all the time that you have been at the post office? A. Yes, sir.

Q. Are you familiar wih the term mail watch or mail cover? A. Yes, sir.

Q. What is the exact nature of your duties at the Ansonia branch? A. I am a clerk. I box up the mail at the case in front of us.

Q. You say you box mail. Do I understand that that is to sort it? A. When we come in to work there is mail in front of us. We sit down on the case and we box up the mail for the different routes.

Q. You mean you sort the mail—

By the Court:

Q. In other words, you have a rack in front of you? [509] A. Yes.

Q. With certain squares? A. That is right, and we throw it in.

Q. And you throw into each square mail for the address that is on the route represented for that square, is that right? A. That is right.

Q. And then after that do you tie it up or does the deliverer pick it up and tie it up and put it in his bag and go out with it? A. There is certain ones we do it and certain ones we don't, sir.

The Court: All right.

By Mr. Williams:

Q. Do you know in what form the mail goes to 115 Central Park West? A. We have a box on the righthand corner. It is marked 115 Central Park West. We throw the mail in there.

Q. Does it go out sorted by names or does it go out in a sack for sorting at the apartment house? A. Well, we take all the mail for 115 West—Central Park West and throw it into that box.

Q. As it leaves the Ansonia branch is it sorted [510] as to residence, names or simply delivered in a stack? A. Well, it is a drop. It is a drop. It goes to Route 32. The carrier has a rack there and that rack has a bag that is marked 115 Central Park West. It goes into that bag.

Q. And he drops that bag at the building? A. Yes. That is supposed to be picked up by the carrier and he drops that bag.

Q. At the building? A. At the building.

Q. Does the carrier sort it down into individual names or is it left, if you know? A. No, he doesn't sort it down into individual names.

By the Court:

Q. That is left to somebody, the floor man or somebody like that in the apartment? A. In the apartment, yes, sir.

By Mr. Williams:

Q. Now, do you have any recollection of a mail watch or a mail cover on a Frank Costello at 115 Central Park West? A. I remember we had a watch on Mr. Costello.

[511] Q. Do you remember for how long it was? A. It was on and off. We had other watches, too. We get them all the time.

Q. I want your best recollection as to the duration of this if you can give it to us. A. I don't know what you mean by that question.

By the Court:

Q. Well, as far as you recall when did the watch on Frank Costello's mail begin and when did it end? A. I couldn't give the exact time. It was a couple of years ago I believe.

Q. Well, did it last for a month or a year or six months or three months? A. I mean sometimes we have watches that are three to six months.

Q. No. We are only concerned with this one for a man named Costello. A. It was on and off, as I remember. It was on for a couple and off again.

Q. Did it occur one year or did it extend over more than one year? A. I would say it extended more than one year.

Q. Do you recall what year it was it began? A. I know it is a couple of years back but I [512] couldn't state the right time.

Q. Very well. That is as near as you can tell. A couple of years back? A. Yes.

Q. That would be 1955? A. Oh, more than that.

Q. 1954? A. 1954, 1953.

Q. 1953 and 1954? A. Yes.

Q. 1952, possibly? A. Might be.

Q. 1951? A. I wasn't at that station in 1951, sir.

Q. As far as you know it might have been 1952 but it wasn't later than 1955? A. No, sir.

The Court: All right.

By Mr. Williams:

Q. Now, when you came to mail on which there was a cover, or watch mail what did you do with it? A. While we are boxing up we pull out the watch, what we are supposed to pull, you pull it out and put it down in front of us.

[513] Q. Put it down in front of you? A. Yes. I mean in front of the case. We leave it on top of the other mail to decide. Say I am boxing up over here (indicating), I take out a letter I am supposed to pull out; instead of getting up each time and putting it on the desk, we just lay it over here and leave it to later.

Q. What do you do with it? A. Well, after we finish, well, maybe as we are boxing up it is time for lunch—I may take that and throw it on the desk where it is supposed to go.

The Court: What desk is that?

The Witness: That is the supervisor's desk in the middle of the floor.

Q. Well, what is the normal length of time that the watch mail or cover mail remains set aside? Is it the end

of your tour, as you call it? A. Yes, it is to the end of our tour.

Q. What do you mean by tour? A. Well, if you are working from 6 a. m. to 2:30 p. m., that would be the end of the tour.

Q. What are you supposed to do with it, if anything?

The Court: Just a minute.

[514] *By the Court*:

Q. Are you telling us now that if you start to work at six in the evening and work until two in the morning—A. There is different tours; 6 a. m. to 2 p. m.

Q. Well, 6 a. m. to 2 p. m., let us take that one:

Suppose you started at 6 a. m. and work until 2 p. m., and suppose during one day you were supposed to watch for mail addressed to a man named Frank Costello, you have told us that as you went through the box if you came across a letter addressed to this man Costello you would take that and lay that aside and go on with your boxing? A. Yes.

Q. Until you reached a point where maybe you were going to take a little rest? A. Yes.

Q. And that you did take any of the mail that was being watched and gave it to the supervisor? A. We put it on the desk.

Q. You put it on the desk? A. Yes.

Q. But you wouldn't wait until 2 p. m. to do that? If you had found that mail, that piece of mail at half-past [515] six you wouldn't keep it on your desk until half-past two in the afternoon? A. We might keep it until nine, half-past seven—it depends. If I am—

Q. Are you suggesting that you never leave your box from six in the morning? A. No, I am not suggesting that. No, I have left the box.

Q. But there were times when you wouldn't bother picking up watch mail until the end of the day? A. Yes.

Q. It might be either way? A. Yes.

Q. If you thought of it when you were leaving to have a cup of coffee or something you would do it? A. Yes.

Q. You would wait until the end of the day to do it? A. Yes.

Q. So it might not only be a short period but a full eight-hour period? A. Yes.

[516] *By Mr. Williams*:

Q. You say you put it on the supervisor's desk? A. Yes.

Q. You worked what shift? A. Well, I am working the 12a. m. to 8:30 p. m. At that time I believe I worked in the day and the night. I have been on that shift now going on four years.

Q. Well, have you ever had a watch on Costello during the time you were on the night shift? A. It is a couple of years ago. It would be in 1953 or so. I mean on the night shift.

Q. Is there a supervisor there all night? A. We have either a foreman or an assistant supervisor.

Q. Do you know what happened to the mail that you had seen, watch or cover mail after it is put on the supervisor's desk.? A. You mean during my tour?

By the Court:

Q. Do you know what the general practice is with respect to this mail that is being watched after a man like yourself puts it on the supervisor's desk? Do you know what the supervisor does with it? [517] A. It is supposed to be written up on some kind of sheet they have.

Q. What do you mean by written up? A. Take the names from it, who it comes from.

Q. Did you ever do that? A. No.

Q. Did you ever see that sheet? A. I seen somebody that done it.

Q. No. Did you see the sheet? A. You mean for this particular—

Q. Any time? A. Yes, I seen the sheet.

Q. What does it contain? The name of the person to whom the letter was addressed? A. Yes.

Q. And the name of the sender of the letter? A. Yes.

Q. And the post office? A. Yes.

The Court: All right.

By Mr. Williams:

Q. Now, what do you do with your regular mail that you have boxed as you say when you finish your tour of duty? [518] A. Well, the regular mail we are boxing in different routes, we get a bell at the end of the tour, or whatever time the supervisor wants to give the bell, a quarter to eight, ten to eight, five to eight, five or ten after—we have had it as high as 15 after; then the carriers come and skin out the mail for their routes and carry it to their—

Q. What do you mean by skin it? A. I mean take the mail out of the box. He pulls the mail out of the box. He takes all the mail that is in route 1, for instance.

Q. Are you still there when the carrier com. for the mail you sorted? A. Yes.

Q. Is that invariably true? You are sorting the mail and then the carrier takes the mail out? A. Yes.

Q. That is true? A. Yes.

Q. What is the fact with respect to mail that is covered? Does it or does it not normally make the delivery it would have made had it not been watched or covered? A. You mean, does it go out on the first trip, [519] the mail that is watched?

Q. Yes. A. I don't think it could make the first trip.

Q. What trip does it make? A. Well, at that time we had two trips. It would make the second trip if the mail goes to the carrier. I don't know if the mail goes to the carrier.

Q. What do you mean it makes the second trip? You mean the afternoon delivery? A. We had two trips at that time. Now we only have one trip.

Q. When you say two trips you mean morning and afternoon delivery? A. It was the morning and a business delivery; two deliveries.

Q. Well, would there be a delay on watched mail? A. Well, if I am leaving at 8:25 and I throw mail on the desk of the supervisor, and the carriers was tying out their mail, it possibly couldn't make that delivery.

Mr. Christy: I object to that, your Honor. It is speculation on his part.

The Court: Overruled.

[520] Q. Well, do you know what the practice is of the clerks generally on the boxes, with respect to watch mail? Do you know whether it is the same as yours or different? A. You mean if they do the same thing I do?

Q. Yes. A. They do the same thing. I mean, they box up the mail and they are supposed to pull out the same as I do.

Q. I am asking you with respect to watch or cover mail. A. Well, I pull the watch mail and they are supposed to pull the watch mail.

Q. Do they follow the same practice you do with respect to the time when they put it on the supervisor's or superintendent's desk? A. Well, they might have thrown it on the desk already, or they might leave it until 8:30. Each clerk works different.

Q. You have been there six years, right? A. Five and a half.

Q. How long? A. Five and a half or six.

The Court: Five and a half or six.

[521] All right.

Q. Now, do you or don't you know what the general practice is there with respect to mail that is watched or covered as to when it gets out? A. Well, when I leave at 8:30—

Q. Well, does it get out on the regular delivery, or when does it get out? What is the regular routine practice over there? A. Well, if the mail is laying on the superintendent's desk it can't get out on the first delivery.

Q. Now—

By the Court:

Q. Well, that is the difficulty, Mr. Witness. If something happens, why, it probably changes the result that would occur if that thing didn't happen, but what you are being asked is whether you are able to say from your knowledge there is a general rule, general practice, under which watch mail gets delivered to the addressee later than mail which is not watched? A. Well, let us—

Q. Well, no, no. A. I want to explain.

Q. That is the difficulty. We don't want you to rationalize it. We want to know if you know. [522] If you don't know, tell us you don't know. A. Well, yes, I mean, if 8.15 or 8.10—

Q. You are starting off on an if basis and that is what we don't want. A. Say 8.15 we drop the mail, I mean, we take the mail out of the box and start tying out. Then at 1.15 we throw it in the bag. The carrier comes and

drops that bag, he takes it, and the watch mail is still on the desk; it can't possibly make the first delivery.

Q. Well, of course, we appreciate that repetition of what you have told us about three or four times, but it doesn't answer our question.

The Court: And I suggest you repeat it, Mr. Williams, because the witness is apparently unable to understand the question as you put it or I put it.

Mr. Williams: Could I try it once more, your Honor, because I would like to get an answer one way or the other here.

The Court: Sure, go ahead.

By Mr. Williams:

Q. If you have a cover on mail over at the Ansonia branch is it usual to not be delayed one delivery or is it usual that it is delayed one delivery?

Mr. Christy: I object to that, your Honor.

[523] The Court: Overruled, if the witness knows. Now please don't start the answer with if, Mr. Witness.

A. I think it is delayed a delivery.

Mr. Williams: That is all I have.

Cross-examination by Mr. Christy:

Q. Mr. Kowalski, you are not a carrier; is that right? A. No, sir.

Q. You are just a clerk? A. Yes, sir.

Q. When you are working the 6 a.m. shift, 6 a.m. to 2 p.m., you come in in the morning and you sort the mail; is that right? A. Yes, sir, or I may have other details. It

all depends on the supervisor. Our general work as a clerk is to sort mail.

Q. Do you separate it into routes? A. Yes, sir. We have 33 routes.

Q. You break it down into the routes? A. That's right.

Q. Breaking it down into the routes, is it part of your job to pull out letters on which there is a mail [524] watch? A. Yes, sir.

Q. And in sorting it down into routes, I understand you have a box which is 115 Central Park West? A. Yes, sir.

Q. You throw the 115 Central Park West mail into there? A. Yes, sir.

Q. And if you come across a letter for Costello you would hold it out? A. Yes, sir.

Q. And the carrier comes in later in the morning and he picks up the mail on his route; right? A. Route 32 or Route 12, Route 18, whatever the route may be.

Q. Is the mail to Costello delivered by carrier or by drop or by both? A. By truck, drop.

Q. By— A. Drop.

Q. In other words, the carrier doesn't deliver it? A. No, sir.

Q. The drop comes from this box that you describe [525] where you put 115 Central Park West? A. Yes, sir.

Q. And you take a letter for Costello and give it to the supervisor? A. Put it on his desk.

Q. Put it on his desk. And he may put it back in the box, 115 Central Park West? A. Since I have been there, they never done that. I never seen it.

Q. Did they give it back to you? A. It stays on the desk. It has to be written up on a sheet.

Q. After that is done, what happens to it? A. It lays on the desk.

Q. How long does it lay there? A. I don't know. I think it is supposed to go to the superintendent's office.

Q. You don't know what happens to it, do you?

William John Kowalski—for Defendant—Cross

The Court: You don't know what happens to it, do you?

A. No. It lays on his desk. I don't know what procedure—

Q. For all you know, those letters may be delivered at the first drop; right? [526] A. Well, it is impossible for them to deliver it at the first drop. Going home I still see the letters on the desk.

Q. Are they there the next morning? A. Well, from the midnight tour, if there is any letters that are there, they may be there in the morning when we come in.

The Court: Mr. Witness, will you please stop telling us they might be there.

The Witness: Yes, sir.

The Court: Anything might be there.

The Witness: Yes, sir.

The Court: Anything might happen. What we are trying to find out is what does happen.

The Witness: Yes, sir.

By Mr. Christy:

Q. When the supervisor gets through with whatever he is doing with the letters, what does he do with them? A. I don't know.

Q. You don't know? A. I don't know.

Q. He doesn't give them back to you? A. No, sir.

[527] Q. So you don't know whether or not they go out with the first mail or not; right? A. Well, from working in the post office—

The Court: Now, do you know or don't you know? You see, you argue this point all the time.

When you hand the letter to the supervisor because it is a watched letter, you put it on his desk, don't you?

The Witness: Yes, sir.

The Court: Now, is it any part of your duty to inquire how soon the supervisor does whatever he is supposed to do?

The Witness: It is none of my business.

The Court: Have you ever asked the supervisor?

The Witness: I don't think so.

The Court: Have you ever gone back and seen lying on his desk the letter which you left there?

The Witness: Well, I couldn't say if it is my letter, but there are letters that are lying there.

The Court: All right. But I am asking you now about the letter that you left there. Have you ever had that occur?

The Witness: I couldn't see my letter [528] there.

The Court: No, you couldn't see your letter lying there. So the fact is you don't know how soon after you have left a letter the particular letter that you left got off that desk and got out for delivery; you don't know of your knowledge?

The Witness: Well, if I leave a letter at 8:25—

The Court: Don't tell me "if" again, Mr. Witness. I am trying to find out what your knowledge is. You don't know, do you?

The Witness: Well, I mean, working in the post office—

The Court: Do you know? Did you ever get back from the supervisor a letter which you have left there?

The Witness: No, sir.

The Court: Very well. That's enough. It is perfectly obvious that you don't know. You are just arguing to yourself what the possibilities are. We can all do that.

By Mr. Christy:

Q. So the fact is you don't know if there was any delay; is that correct?

[529] The Court: All right. If you want to keep—

Q. That's correct, isn't it?

The Court: He has just said that.

Mr. Christy: All right, sir. No further questions.

The Court: He has demonstrated it. Let's get along.

Have you got another witness, Mr. Williams?

Mr. Williams: Yes, your Honor.

The Court: Are you finished with this one?

Mr. Williams: Your Honor, Mr. James Smith—

The Court: Are you finished with him?

Mr. Williams: Yes.

The Court: You are not going to call the witness back again, are you?

Mr. Williams: No.

The Court: You are excused.

(Witness excused.)

Mr. Williams: Mr. James Smith.

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[530] WILLIAM J. SMITH, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Smith? A. Port Washington, Long Island.

Q. What is your address out there? A. 20 Alrad Gardens.

Q. How long have you lived there? A. Thirteen months.

Q. Are you an employee of the Post Office Department out there? A. Yes, sir.

Q. How long have you been so employed? A. A little better than 26 years.

Q. Mr. Smith, do you know what a mail watch or a mail cover is? A. Yes, I do.

Q. Does the area which the Port Washington Post Office serves include Sands Point? A. Yes, sir.

Q. Do you know whether or not at any time there was a mail watch on Frank Costello of Barker Road, Sands Point? [531] A. Yes, I do.

Q. Do you know approximately how long that watch was on? A. Approximately how long?

Q. Yes. A. No, I don't.

Q. How did you know the watch was on, sir? A. Well, I saw a slip with a note—a slip of paper with a note on it on Mr. Costello's post office box.

Q. Did Mr. Costello have a box out there at which he had to pick up his mail? A. Yes, sir.

Q. Is that the general practice out there? A. No, it is not. We have village delivery or city delivery.

Q. His mail was picked up at the post office? A. Yes, sir.

Q. What did the sign say over his box? A. Gee, I don't recall the exact words.

Q. What was the substance of it? A. Well, to be sure that Mr. Costello's mail was checked before it was put in the box or that the Costellos' mail was checked before it was put into the [532] box.

Q. How long was that sign up, to your knowledge? A. That I do not know.

Q. What is the best estimate you can give us?

The Court: Can you tell us, first, when you first saw it?

The Witness: When?

The Court: Yes. When did it start, if you know?

The Witness: It is quite a few years back.

The Court: Before you went there?

The Witness: No.

The Court: You have been there all these 26 years?

The Witness: Yes, sir. I would say four or five years back.

The Court: Before 1953?

The Witness: 1952 or 1953, somewhere in that vicinity.

By Mr. Williams:

Q. Now, can you tell us approximately how long it was in effect? A. No, sir, I do not know.

Q. Was it a year or two years or a month or a [533] week or three years or how long?

Mr. Christy: The witness has said he doesn't know, your Honor.

The Court: Overruled.

A. No, I can't answer that. I don't know.

Q. Are records kept at the Port Washington Post Office of mail watches and the duration of their effectiveness? A. I can't answer that because I am not in a position to know whether or not they are kept.

Q. What was the practice with respect to his mail? Was it put in the box at the same time as other mail which went into boxes out there at the Port Washington Post Office? A. Well, I can't truthfully say because I don't know what procedure was used in handling the mail of Mr. Costello.

William J. Smith—for Defendant—Cross

Q. What is the normal practice with respect to mail which comes in which is going into private boxes? Is it put into the box when it comes in after it is sorted? A. After it is sorted, yes, it is usually put into the box.

Q. The sorters were directed, with respect to his [534] box, not to put it in his box until it was recorded; is that right? A. That's right.

Q. Do you know who recorded it? A. No, I do not. It could be any one of four or five.

Q. What do you mean by "any one of four or five"? A. It could be the postmaster, the assistant postmaster, the superintendent of mail, assistant superintendent or the foreman.

Q. But, in any event, the directive was it should not be put into the box with the other mail until it had gone through a course of being recorded; is that right? A. It was to be checked—

Mr. Christy: That is not quite what he said. I object to the form of that question, your Honor. I don't think that is quite what the witness has testified to.

The Court: I thought it was. Overruled.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. You are familiar with mail watches out there, Mr. Smith? [535] A. Yes, sir.

Q. When there is a mail watch placed on some subscriber, there is never any delay in getting the mail into the box, is there? A. Well, there shouldn't be any delay. Whether there is or not I am not in a position to say.

Q. Except perhaps the few minutes that it would take to note— A. Yes. I would say yes.

Q. But the mail is promptly put in the box even when there is a mail watch; is that correct? A. I would say yes, unless there was some human error made, which I don't know.

The Court: You don't know, really, do you?
The Witness: No, sir, I do not.
Mr. Christy: No further questions, your Honor.
(Witness excused.)
Mr. Williams: Call Mr. McKenna, please, Mr. Marshal.

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[536] JOHN JOSEPH MCKENNA, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. McKenna? A. 618 West 187th Street, Manhattan.
Q. How long have you lived there, sir? A. I have lived there about a year.
Q. What is your occupation? A. I am mail clerk at the Majestic Apartments.
Q. How long have you been engaged as mail clerk at the Majestic Apartments? A. Since 1949.
Q. Mr. McKenna—

The Court: Are you employed by the Post Office Department or by the apartment house?
The Witness: By the apartment house, your Honor.
The Court: Very well.

Q. Mr. McKenna, are you familiar with the fact that you have a tenant in that building named Costello? A. Yes, sir.

John Joseph McKenna—for Defendant—Direct

Q. At any time was any unusual treatment given to his mail? [537] A. Yes, sir. I was shown an order from the post office to carriers on Route 22 saying there was a watch on his mail for a certain period of time—I think it was about 15 days—and the carrier asked me to return it to the post office for a check as they were afraid it was getting through without being checked.

The Court: Just read that answer to me. I didn't quite hear it.

Speak up a little bit louder, Mr. McKenna.

Read the answer to me.

(Answer read.)

By the Court:

Q. Asked you to return what to the post office—the order? A. The mail.

Q. Was this on a particular day this occurred? A. No, for a certain period of 15 days.

Q. In other words, during that period any mail that came there addressed to Frank Costello you were to hold and give back to the carrier? A. Yes, your Honor.

Q. I see. All right. Now, when did that occur, do you know? A. I can't pin it down to the particular year, but [538] I think it was '53.

The Court: All right.

By Mr. Williams:

Q. Now, during this particular period did you in fact return this mail to the carrier? A. Yes, I did.

Q. And when was it delivered? A. The following day.

Q. Mr. McKenna, could this have taken place back as far as '51? A. It is possible that it could have.

Q. Did this happen on more than one occasion? A. To the best of my recollection, it did. It happened on at least two occasions.

Q. In other words, is it your testimony that there were two periods of time during which they retrieved Mr. Costello's mail? A. Yes, sir.

Q. Was the second period of time of equal or of shorter or longer duration? A. I don't really remember. I think they were about the same. I think they were both for about a 15-day period.

Q. Who was it who actually showed you the order [539] at the time the mail was retrieved? A. It was either Mr. Johnson or Mr. Folson, mail carriers. I think it was Johnson.

Q. How do you get your mail at the Majestic Apartments? A. In large sacks.

Q. Is the mail segregated at the time you get it? A. No.

Q. Who does the actual physical segregation of the mail? A. I do.

Q. On these occasions of which you speak, was the Costello mail segregated at the time you received it or did you segregate it and then return it? A. I segregated it and returned it.

Q. You returned it? A. All the mail was mixed up together.

Q. I am sorry. I didn't hear the last. A. I said all the mail in the building was mixed up together.

The Court: Try to keep your voice up, please.
The Witness: Yes, your Honor.

Q. What is your recollection, then, that it was [540] 30 times when you did this? A. I would say that, yes.

Q. Could it have happened more than on two periods of time? A. Not that I remember.

John Joseph McKenna—for Defendant—Cross

Q. Is there anyone else who is a mail clerk there, Mr. McKenna? A. Mr. Sulkess, my immediate supervisor, takes care of the mail occasionally when I am not there.

Q. Before you returned the mail, did you have to get Mr. Sulkess' authorization? A. I informed him of the order.

Q. Is he your superior? A. Yes.

Q. And it was necessary for you to get his okay before you did anything with any tenant's mail that was unusual? A. Yes, it was advisable.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. You have been at the Majestic since 1949, Mr. McKenna? A. I have been there since 1932.

Q. Since 1932? [541] A. Yes.

Q. Since 1949 you have been in this position? A. That's right, sir.

Q. And do I understand that Mr. Sulkess is your superior? A. Yes, sir.

Q. You mentioned the names of two carriers, Johnson and Folson. A. Yes, sir.

Q. And are you certain that it was one of these two that gave you these instructions? A. It was one of those two.

Q. Were the instructions written? A. The order to return the mail wasn't written. The rest of the order notifying carriers on Route 32 was written.

Q. Did they show you some papers? A. Yes.

Q. What did the papers say? A. The paper was addressed to all carriers on Route 32 saying there was a watch on the mail for the Costello family at 115 Central Park West.

John Joseph McKenna—for Defendant—Cross

Q. That's all? A. Well, that's all I can remember. There might [542] have been something more but I don't think it meant any change.

Q. This was just a note to the carriers that there was in fact a watch on Frank Costello at 115 Central Park West? A. Yes, like a memo.

Q. And one of those two men showed it to you? A. That's right.

Q. And what did he tell you then? A. He asked me—they wanted the mail returned to the post office as they were afraid it was getting through from the clerks without being checked and they would return it the next day.

Q. The carrier asked you this? A. That's right.

Q. And then what did you do? A. I followed those instructions.

Q. Did you talk to Mr. Sulkess about it? A. I informed Mr. Sulkess about it, yes. He was the only one I spoke to about it.

Q. And this happened, you say, on two occasions? A. To the best of my knowledge, it was two occasions, yes. Two periods of time, rather.

Q. And then when the mail came in, you said you [543] would segregate it and you would take out any letters to Costello? A. That's right.

Q. And what did you do with them? A. Gave them back to the carrier when he called back later in the morning.

Q. What time did the carrier generally come around? A. The carrier generally came around on two periods, about 10 o'clock and he came back about one for the mail that I had readdressed and any other thing that was going back.

Q. When the carrier came around, did he bring mail? A. Registered.

Q. He only brought registered mail? A. That's right.

The Court: You mean on the second call, not the first call.

The Witness: On the first call he brought registered mail.

The Court: Only registered mail?

The Witness: That's right. The rest of our mail is delivered in bulk, your Honor.

[544] The Court: I see.

By Mr. Christy:

Q. What time does the bulk mail arrive? A. At that time?

Q. Yes. A. About 8.

Q. And what time did the carrier return? A. On the first trip?

Q. Yes. A. Probably about 9:30 or 10.

Q. Didn't you give him the mail then? A. I wouldn't be finished then.

Q. Did you give him the mail at his first trip? A. No, on the second.

Q. What time was the second trip? A. About one.

Q. And you would give him mail? A. Yes.

Q. And when would he bring it back? A. The following day. It would come back in the sack. He didn't really bring it back. It was usually tied together separately.

Q. Do you recall—

The Court: Just a moment please. There

[545] was a time when mail came addressed to the Costellos that was loose in the sack; is that right?

The Witness: Yes, your Honor.

The Court: During this period you would take that, set it aside and give that back to the carriers?

The Witness: Yes.

John Joseph McKenna—for Defendant—Cross

The Court: If it came all tied up, you didn't send that back with the carriers, you gave that to the Costellos?

The Witness: That mail had already been checked.

By Mr. Christy:

Q. Each one of these requests lasted for fifteen days? A. For a period something like that, sir.

Q. Do you recall giving any mail back to the carrier? A. Yes, I do.

Q. On how many days? A. On how many days?

Q. Yes. A. Well, I couldn't really say how many days and put it down definitely, but for the period I am sure there was mail each day.

[546] Q. And as far as you know that mail was delivered the following day? A. Yes, sir.

Mr. Christy: May I have just a minute, your Honor?

The Court: Yes.

(Pause.)

By Mr. Christy:

Q. When did the mail generally become available to the tenants in the apartment house? A. Well, there are 250 tenants in the building and about a thousand individuals, and it usually required about two hours or so to sort the mail and then it was delivered to each one's door.

The Court: Do you make the delivery?

The Witness: Yes, sir.

Q. So it would be available to them some time in the afternoon, early afternoon? A. Well, it should be available to them before noon.

John Joseph McKenna—for Defendant—Cross

Mr. Christy: No further questions.
The Court: Any further questions?
Mr. Williams: I have no further questions.
(Witness excused.)
The Court: We will take our recess now until 2:15.
(Recess taken until 2:15 P. M.)

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[547] Afternoon Session.

Merwin Sulkess, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live? A. 60-12 Little Neck Parkway, Little Neck, Queens.

Q. How long have you lived there? A. Four years.

Q. What is your occupation at the present time? A. I am haul captain at the Majestic apartments, 115 Central Park West.

Q. How long have you been so occupied? A. 22 years.

Q. Now, in your capacity as captain do you have direct supervision over the mail room? A. I have direct supervision over the mail room and all uniformed personnel.

Q. Do you know John McKenna? A. Yes.

Q. What is his job at the Majestic apartments? A. Mail clerk.

[548] Q. How long has he been so occupied?

Mr. Christy: Your Honor, I think Mr. McKenna testified to this this morning.
The Court: Yes, but I will allow it.

A. I believe it is eight years or nine years. Since 1949, the early part of 1949. I think it was January 1949.

Merwin Sulkess—for Defendant—Direct

Q. Now, in the normal course of his duties is he required to report to you with respect to any unusual disposition of the mail? A. Anything unusual in the building, yes.

Q. Did there come a time when anything unusual happened with respect to the mail of a tenant in your building named Costello? A. Yes, sir.

Q. Can you fix that in point of time for us, please? A. It was early, in the early 50's; either 1951 or 1952; I am not exactly sure.

Q. What happened?

Mr. Christy: I object to this, your Honor. The witness McKenna has already testified to it.

The Court: Overruled.

Q. You may answer that. [549] A. Answer the question?

Q. The Court has ruled you may answer. A. The mail clerk told me—

Mr. Christy: Well, now, I object. This is just hearsay.

The Court: Overruled.

A. (Continuing) That he had gotten an order from the mailman to hold the mail for the Costellos and he showed me an order—it was a white sheet of paper, and that was all there was to it, and he held the mail and the mailman each day would pick it up.

[550] Q. How long a period did that last, sir? A. Well, I don't know; maybe two or three weeks.

Q. On how many occasions—by that I mean how many periods of time—were there, to the best of your recollection, when this procedure was followed with respect to mail of the Costellos? A. Well, it was twice that I know of, that I am sure of.

Merwin Sulkess—for Defendant—Cross

Q. How long did the second period last in relationship to the first period? A. I think it was only a few months separated.

Q. How long did the procedure last the second time whereby the mail was returned each morning to the post office? A. Around a couple of weeks.

Q. And you place this in the early 50's; is that correct? A. Yes, sir.

Q. Do you know of your knowledge when that mail was returned to the building?

The Court: What mail?

Mr. Williams: The mail, your Honor, which was sent back to the post office.

[551] The Court: All right, ask the witness that.

A. You are asking me?

Q. Yes. I am asking you, if you know, Mr. Sulkess, of your knowledge when the mail that was retrieved by the post office belonging to Costello came back to the building? A. I believe it was the following day.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. Mr. Sulkess, did you ever talk to either of the carriers? A. Did I ever talk to the carriers? I have spoken—

The Court: You mean about this?

Q. About this question of the mail that you just testified to. A. I don't believe I did.

Q. You say Mr. McKenna showed you a note? A. It was an order; it was an official order.

Merwin Sulkess—for Defendant—Cross

Q. And that order was addressed to the carrier and merely said that there was a mail watch on Frank Costello at 115 Central Park West? A. The order was to the carrier who would hold the mail for the Costellos.

[552] Q. That there was a mail watch on Frank Costello? A. I guess it was a mail watch. I don't know.

Q. The order did not say anything about picking up the mail at 115 Central Park West and taking it back to— A. This is what the carrier told the mail clerk.

Q. I asked you if the order said anything like that? A. Not to my knowledge.

Q. You are employed by the Majestic Apartments, are you not? A. New York Majestic Corporation.

Q. And McKenna showed you this order on one occasion; is that right? A. That is correct.

Q. And you do not know for how long McKenna may have given any mail to Costello back to the carrier, do you? A. I don't know for how long?

Q. You testified earlier that you thought it might have been two or three weeks? A. Yes.

Q. McKenna did not report to you every day, did he? [553] A. No, sir.

Q. He just showed you the order one day? A. That's correct.

Q. And you don't know for how long McKenna may have given the mail to the carrier? A. No, I can't tell you exactly how long, no.

Q. It might have been one day? A. No, it was more than one day because periodically I would ask John if he was still returning the mail to the carrier, and he told me yes.

Q. And how long did it last? A. Well, two or three weeks. It might have been a litt'e more, and it might have been a little less. I am not sure.

The Court: On each occasion?

The Witness: Yes, sir.

Q. Did he show you an order on the second occasion? A. I don't remember seeing an order on the second occasion.

Q. You never turned over any of this mail to the carrier, did you? A. Not I, no, sir.

Mr. Christy: No further questions, your [554] Honor.

Mr. Williams: I have no questions.

(Witness excused.)

Mr. Williams: Would you call, Mr. Marshal, please, Mr. Johnson?

WILLIAM F. JOHNSON, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Johnson? A. 740 East Gunhill Road.

Q. Where is that, sir? A. Bronx. New York.

Q. How long have you lived there? A. Five years.

Q. Where are you employed? A. U. S. Post Office.

Q. How long have you been employed by the U. S. Post Office? A. Approximately 12 years.

Q. What branch are you employed? A. Ansonia station.

Q. How long have you been employed there? [555] A. Approximately ten years.

Q. In what capacity are you employed? A. As a lettercarrier.

Q. How long have you been employed as a lettercarrier? A. Roughly ten years.

Q. What particular route are you servicing as a lettercarrier? A. At the present?

Q. Yes. A. Route 21.

William F. Johnson—for Defendant—Direct

Q. Was there a time when you serviced a route which included the Majestic Apartments at 72nd and Central Park West? A. I am afraid I can't answer that question, sir.

Q. You can't answer that question? A. No, sir.

Q. Is it that you have no recollection on the subject? A. Oh, yes.

Q. What is the reason that you cannot answer the question? A. Well, sir, there is a postal regulation.

The Court: There is a postal regulation [556] preventing you from disclosing what route you worked on?

The Witness: No. I answered that.

The Court: I say what is the postal regulation that you are talking about now? You were just asked if you had ever serviced a building at 115 Central Park West and you say that you may not answer that because of some postal regulation.

The Witness: I serviced 115 Central Park West, yes.

The Court: That is the question you were asked, if you had serviced that route.

The Witness: Yes, I have.

[557] Q. When was that that you served the route which included 115 Central Park West? A. I don't understand the question.

By the Court:

Q. When was it? In what year were you on the route that included that address? A. I am afraid I couldn't very well tell that either because at that time I was serving as a floater more or less over different routes.

Q. When was that that you served as a floater? A. Well, I would say for the last nine and a half years because I only received my own route later.

Q. You received route 21 later? A. Yes. The first or second month of this year.

Q. 1957? A. Yes.

Q. For nine years prior to 1957 you say you were a floater. By that you mean you worked one day on one route? A. Yes.

Q. And another day on another route? A. Yes.

Q. But during that nine-year period was there [558] some time when your duties required you to service 115 West—Central Park West? A. Yes, sir.

Q. Can you tell us with any degree of definiteness what year that was, or might it have been at any time during those nine years? A. It might have been at any time.

The Court: All right.

By Mr. Williams:

Q. In other words, over a nine-year period you served intermittently— A. Yes.

Q. Or periodically this apartment? A. Yes.

Q. The fact is that generally you were working in the area which serviced this apartment, were you not? A. No, sir. I was all over the station. My station comprises from 76th to 60th Street.

Q. How long in the course of a week let us say did you service 115 Central Park West? A. Well, roughly for a period of time there I would say at least twice a week.

Q. For what period of time was that? [559] A. I think it was more or less around 1948 or 1949; something like that.

Q. Well, in the 50's, 1951, 1952 how frequently were you serving the mail at 115 Central Park West? A. More or less in the same capacity. At one time I had—I would

recall covering the route. The man that was on the route was out ill. Then I would have to deliver it for say approximately a whole week.

Q. Do you know, Mr. Johnson, what a mail watch is? A. Yes, I am aware of it.

Q. Or mail cover? What do you call it? A mail watch? A. A mail watch.

Q. Now, when you were servicing 115 Central Park West do you recall a mail watch on the mail of a Frank Costello?

The Witness: Your Honor, do I have to answer this question?

The Court: Yes.

A. Yes, sir.

Q. Do you recall over what period of time it was? A. No, sir, I couldn't.

Q. Do you recall occasions when you brought mail back to the Ansonia branch? [560] A. No, sir.

Q. Do you deny that such instances took place? A. I do, sir.

Q. You didn't take his mail back? A. No, sir.

Q. How are you aware of the mail watch on him? A. We had a written order specifying that we were to hold out any letters addressed to Mr. Costello, submit them to a supervisor on the floor, and immediately they were returned for delivery.

Q. Now, how did you deliver that mail to 115 Central Park West? A. Well, that is what we call a drop house. They have a mail clerk there who distributes the mail throughout the building. We only box it up in the station.

Q. In other words, Mr. Johnson, you simply delivered a stack of mail which is designated for 115 Central Park West, is that right? A. Quite right.

Q. In other words, you had an order outstanding to bring Mr. Costello's mail to the superintendent? A. No, sir—yes, to bring it to the superintendent, yes.

[561] Q. Well, now, that order applied to you as the carrier for 115 Central Park West, is that correct? A. That is correct.

Q. Now, how would you get Mr. Costello's mail? A. When I boxed it up, if I came across any letters for him I held it aside until I gave it to the supervisor.

Q. Didn't I understand you to testify a moment ago that you dropped the mail at 115 Central Park West in a stack unsegregated?

Mr. Christy: No, he didn't testify that.

A. No, you have that quite wrong. That is all mixed up.

Q. Well, how did you do it? A. We handled a certain amount of mail on our case. Naturally, any letters I came across for Costello I had to hold them aside, but also, clerks boxing up during the day and night have pigeonholed especially for 115 Central Park West mail; that mail I have no control over. I didn't have anything to do with it. It was merely to put in sacks and delivered to 115 Central Park West.

Does that answer your question?

[562] What mail was it, Mr. Johnson, that you control to the extent that you separated by tenants at 115 Central Park West? A. None whatsoever.

Q. Well, I may be denser than usual today, but I understood you said you did segregate mail that didn't go in sacks and that was segregated by tenants. Am I wrong about that? A. I don't think I got you.

Q. Let me ask you this:

How is it that you would come across mail which would be marked Frank Costello if the mail clerk at the Majestic

was the one who was separating it? A. I don't think you quite understood what I said. I handle between two to three thousand letters in the morning when I report to work.

By the Court:

Q. When you say you would handle it, explain what you mean by handling it? A. Handled by separation on the case to various houses on the route.

Q. In other words, you did sorting of a kind that the clerk would do? A. That the clerk would do, yes.

By Mr. Williams:

Q. And this was mail that you sorted on your route? A. That is right.

Q. Is that right? A. That is correct.

Q. Well, isn't this mail which you received from the clerk who had worked that night? A. Yes.

Q. Well, now, if the watch was on the clerk was supposed to segregate Mr. Costello's mail, is that correct? A. That is right.

Q. Then there was a further watch which you was supposed to follow, is that correct? A. That is correct.

Q. And when you came across his mail it was your job to bring it to the superintendent? A. Superintendent—supervisor.

Q. Supervisor? A. Yes.

Q. What did the supervisor do with it? A. Well, he is in charge of the floor.

The Court: What did he do with the mail you [564] brought to him, if you know?

The Witness: Well, in so far as I saw a notation made in a book. Anything other than that I have no knowledge of.

Q. When did he make the notation in the book? A. More or less immediately.

Q. Well, were there occasions when you left the mail on his desk for him to record in the book in his absence? A. At times, yes, I dare say I have, but I expressly want you to understand that we have orders and regulations that mail must be delivered that I have handled that day. So naturally I made an effort on my part to go over and retrieve this mail so that it was delivered at the same time.

Q. I understand what the orders and regulations are, Mr. Johnson. A. Yes.

Q. But I am not asking you about the orders and regulations; I am asking you whether there were occasions when you dropped mail at the superintendent's desk when he wasn't there? A. Oh, yes.

Q. And you went out on your deliveries? [565] A. No, sir. You see, there is quite a bit of time limit between the time I drop a letter on the supervisor's desk. Then I still would have other work to do before I hit the streets. By the time I was ready to leave to make my deliveries, the supervisor had returned the letter to me for delivery to 115.

Q. Well, now, were there any occasions when that didn't happen? A. Not to my knowledge, sir.

Q. Mr. Johnson, do you know of an instant or instances where the Costello mail was returned after delivery? A. Not to my knowledge, sir.

Q. You have no knowledge on that subject at all? A. No, sir. I wouldn't have any such order.

Q. Who would have such an order?

Mr. Christy: Objection.

The Court: Sustained.

Q. Would it not be in the regular course of business of the letter-carrier for the route to retrieve such mail if there were an order such as this?

Mr. Christy: Objection.

A. I never received such an order.

[566] Mr. Williams: Your Honor, I am sorry to have to ask questions which appear to be discovery questions, but this witness like the other witness said there was an inhibition upon him precluding them from discussing the matter with us before putting him on the stand.

The Court: Pardon me. I know of no inhibition and have heard no inhibition expressed by any other witness but this one. When he asked if he had to answer a question which he thought he should not answer because of existing regulations, I told him he had to answer it and as far as I know he did. I have ruled on this. The objection to that last question is sustained.

By Mr. Williams:

Q. Who else worked this particular route, Mr. Johnson? A. Mr. Folson.

Q. Folson? A. Folson.

Q. Who else? A. And then there was Mr. Cobb.

Q. Mr. Cobb? A. He is deceased.

[567] Q. When did he die? A. He passed away three or four years ago.

Q. Was there anyone else other than you and Mr. Folson? A. Oh, any number, yes, sir. I couldn't possibly remember how many carriers carried the route out, even the days I was off.

Mr. Williams: Will your Honor indulge me a moment?

The Court: Yes.

(Mr. Williams confers with associates.)

Mr. Williams: One clarifying question.

Q. Is it the carrier, Mr. Johnson, who drops the mail at 115 Central Park West? A. Is it a carrier?

Q. Is it a carrier or is it a truck? A. It is a truck.

Q. It wasn't your function to drop this mail, is that so? A. No, sir. A truck delivered it.

Q. So at no time did you deliver mail at this building except when it was registered? A. Registered, that is correct.

Q. Then Costello mail which was not registered [568] mail or special delivery mail would not be given back to you, would it, after you gave it to the superintendent? A. No, sir.

Q. Well, then, didn't you testify—I understood you to testify a moment ago that it was given back to you and you took it out on the regular delivery? A. From 115?

Q. From the post office, sir. A. Oh, from the post office? Yes. It was given to me for delivery.

By the Court:

Q. Well, did that relate only to registered mail? A. No. It was regular mail.

Q. Regular mail? A. Regular mail.

Q. Were there ocasions when you were sorting this regular mail? A. Yes.

Q. Where you found a letter addressed to Mr. Costello or his wife? A. Yes.

Q. There were such occasions? A. Oh, yes.

[569] Q. And on those occasions did you give them to the supervisor? A. I did, yes.

Q. On those occasions would you then go back to the supervisor and get them in order that you could put it in the big bags of mail? A. Yes, sir.

Q. Very well. Were there times when you came across registered letters addressed to Mr. Costello or his wife? A. Yes, sir.

Q. And on those occasions did you give those letters to the supervisor? A. I imagine I would have, sir, yes.

Q. In that case then did you go back to the supervisor to get them so as to be able to deliver them on the regular delivery? A. Yes, sir.

The Court: All right.

By Mr. Williams:

Q. I understood you to testify previously, Mr. Johnson, that you would take mail back to your delivery after you had given it to the supervisor? A. That is correct.

[570] Q. In other words, so that you could drop it off at 115? A. No. To put it in the bag.

Q. Weren't there occasions when the bag had gone out before that time? A. No.

Q. Doesn't the dropped mail go out before the carried mail? A. No, sir. The dropped mail—at times it goes out ahead of the carried mail and sometimes it doesn't.

Q. Were there occasions when it did in this particular instance? A. I don't understand.

[571] Q. Were there occasions when it did in this particular instance? A. I don't understand what you mean.

Q. What would you do if the dropped mail had already gone out?

Mr. Christy: I object to that.
The Court: Overruled.

A. I don't see that—

The Court: Do you understand the question?
The Witness: More or less.

A. In the first place, it was my responsibility to tie out and put any—well, like you are referring to, Costello mail, the supervisor had in his possession, I had to obtain it and make sure it went out on the drop trip.

Q. Mr. Johnson, the dropped mail should have been sorted out into sacks by the person who had in his box 115 Central Park West, isn't that so— A. I fail to understand.

Q. —before you began your sorting? A. I fail to understand that question.

Q. Isn't it the fact that if the sorters during the night had done their job properly that you would not end up with 115 Central Park West mail? [572] A. Oh, yes, I would, inasmuch as some hours during the night they have what they call a holdout system that goes to special pigeon holes for large buildings. However, certain hours of the night, or something like that, the clerks are instructed more or less to stop putting into these pigeon holes and box it right to the route.

Q. But the purpose, Mr. Johnson, of having 115 Central Park West have a special pigeon hole in the box in so that the sorters will put that mail of 115 Central Park West in the pigeon hole and it will go right from there into the sack marked 115 Central Park West, isn't that so? A. That's right.

Q. So that you, as a carrier for that particular route, if your system were working perfectly, should not end up with any mail for distribution by foot marked 115 Central Park West; isn't that right? A. By foot? Well, on occasion, you might say, I had to take out excess mail that was left in the station, if you mean by that manner.

Q. I mean simply this, Mr. Johnson: You were not supposed to have among your letters for delivery any letters for 115 Central Park West, were you? That [573] was all supposed to go through the drop system; right? A. It was supposed to.

Q. It was supposed to, wasn't it? A. Yes.

The Court: That is all ordinary mail?
Mr. Williams: Except registered letters.

Q. I am only addressing myself to ordinary mail.

Now, when you had arrived on the job to sort the mail that you were going to deliver on your route, if you came across any letter marked 115 Central Park West, it would be because the mail sorters at night had overlooked it; right? A. That's right.

Q. And they would have completed their job at this time, would they not? A. No, the clerks were still working.

Q. What time did you come on? A. At six o'clock.

Q. At six o'clock in the morning? A. Yes, sir.

Q. And what time did the clerks go off? A. 8.30, I believe.

[574] Now, what time would you finish your sorting so that you could go out on your regular deliveries? A. Well, it has varied from time to time. The schedule more or less has been changed so often that I couldn't give you a correct answer on that.

Q. What was it at this particular time we are talking about in '50, '51 and '52? A. I believe that was more or less around 7.30 we were to leave the station.

Q. Now, what time did the trucks leave with the dropped mail? A. Whenever I had it ready for them.

Q. When you had it ready for them? A. Yes, when I had completed my separations and had tied out the mail for the drops.

Q. And you did this for the trucks? A. That's right.

Q. You did this for the trucks on your particular route? A. That's right.

Q. Were there occasions when you tied up the mail for the drops before you received back your mail watch mail from the supervisors? A. May I have that question again, sir?

[575] Q. I say —

William F. Johnson—for Defendant—Direct

The Court: The reporter will read it to you.
(Question read.)
The Court: Do you understand that?
The Witness: Yes, I understand that.

A. No.

Mr. Williams: That is all I have, your Honor.
Mr. Christy: No questions, your Honor:
The Court: You may go.
(Witness excused.)
Mr. Williams: Will you call Mr. Folson, please, Mr. Marshal?

ALEXANDER FOLSON, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Court: Mr. Folson, will you talk out good and loud so the gentlemen at that rear table can hear you?
The Witness: Yes, sir.
The Court: Thank you.

Direct examination by Mr. Williams:

Q. Where do you reside, Mr. Folson? A. 510 West 144th Street.

[576] Q. How long have you lived there? A. Six years.

Q. Where are you employed? A. U. S. Post Office.

Q. How long have you been so employed? A. 30 years.

Q. 30? A. 30.

Q. And in what capacity are you employed as a post office employee? A. As a letter carrier.

Q. How long have you been engaged as a letter carrier? A. 30 years same job.

Q. To what branch are you presently assigned? A. Ansonia Station.

Q. How long have you been assigned to the Ansonia Station? A. Since 1934.

Q. Was there a time, Mr. Folson, when you serviced a route which included the Majestic Apartments? A. Yes.

Q. When was it? A. About 1938 to 1950.

[577] Q. I am sorry. A. 1938 to 1950; from '38 to '50.

Q. And have you not serviced the Majestic Apartments since 1950? A. Yes, for two years, from '52 to '54.

Q. In other words, you serviced that apartment up to 1950 or through 1950 and then you resumed again in 1952 and you went through 1954; is that correct? A. That's right.

Q. And who had that route when you were away from it? A. Johnson was one, William Johnson. He was a kind of auxiliary man on the route.

Q. Did Johnson service that route for that two-year period when you were away from it? A. No, not for the two-year period. I don't remember that.

Q. Do you know who did it? A. I couldn't recall just now. I know Mr. Cobb was one of the men.

Q. Were you doing another route at that time? A. Yes, sir.

Q. Mr. Folson, do you know what a mail watch is? A. A mail watch, yes.

[578] The Court: Speak up, will you, please, Mr. Folson? I can't hear you and I am right alongside of you.

A. Yes, I know what a mail watch is.

Q. Do you remember a mail watch on a Frank Costello at Central Park West?

The Witness: Your Honor, that is confidential post office information and I wouldn't like to testify to it unless I am so ordered.

The Court: Well, I order you now to answer that question.

Do you know whether at any time when you were serving 115 Central Park West there was a mail watch on Frank Costello?

The Witness: Yes, sir, I do remember that.

By Mr. Williams:

Q. You do remember? A. Yes.

Q. What do you remember, that there was one on him? A. Yes, I do remember there was a mail watch.

Q. Do you remember when that was? A. I don't know exactly the time.

Q. Was it between 1950 and 1952 or was it before [579] 1950—I am sorry.

Was it between 1952 and the next two years that you served the route or was it before 1950? A. As near as I can recall, it was before '50.

Q. It was? A. Yes.

Q. Was it also on when you came back to the route? A. I don't just remember, to tell you the truth.

Q. You have no recollection on that, Mr. Folson? A. I don't remember. We have so many of them I just don't remember.

Q. Do you recall occasions when you, under the orders of your superiors, picked up his mail at Central Park West, 115 Central Park West, and brought it back to the post office? A. I don't recall that.

Q. You don't recall that? A. No, sir.

Q. Do you deny that that happened at any time? A. I wouldn't deny it, but I don't recall it.

Q. Do you know a Mr. McKenna, who is the mail clerk there? A. I know Mr. McKenna, yes.

[580] Q. Do you know Mr. Sulkess, who is his superior? A. I don't remember anyone by the name of Sulkess.

Q. Do you know him as Moe? A. I know Moe, yes.

Q. You know Moe? A. Yes.

Q. You know Moe who is there at the building who is the superior of Mr. McKenna? A. Oh, yes.

Q. Is your recollection refreshed, Mr. Folson, that there were occasions when you showed a mail order to Mr. McKenna and brought the mail back pursuant to a direction of your superior, the mail of Mr. Costello? A. I don't remember that.

Q. Do you remember instances of this happening? Wouldn't you recall it if it happened? A. Yes, I would recall it if it happened.

Q. But you don't deny that it happened; is that correct? A. I don't deny it, no.

Q. Is this something that happens in the ordinary conduct of a mail watch, Mr. Folson, that the mail is sometimes retrieved and brought back to the post office? [581] A. No, sir.

Q. Has it happened, to your knowledge? A. Not to my knowledge.

Q. Does it happen? A. Not to my knowledge.

Q. That occasionally a directive comes out for you to retrieve the mail of somebody whose mail is being watched when it is a drop mail? A. No, sir, that mail is retrieved before it leaves the office.

By the Court:

Q. Was there ever any occasion in your 30 years as a carrier where you received instructions from your superior to pick up anybody's mail at that person's address and bring it back in order to make sure that it was properly recorded under the watch? A. No, sir, I don't remember any such order.

Q. Now, specifically, do you recall having done that with respect to mail addressed to any of the Costello family at

115 Central Park West? A. No, sir, I don't remember that.

The Court: Very well.

By Mr. Williams:

Q. Now, what do you remember about the watch on [582] Costello, Mr. Folson? A. All I remember about it is we were supposed to retrieve the mail—if the clerks missed it, the carriers picked it out as they were putting it away.

Q. You say if the clerks missed it the carriers were supposed to retrieve it as they were putting the mail away? A. Yes.

Q. What do you mean? A. Boxing it up and putting it in pigeon holes in the case.

Q. What were you supposed to do with it when you retrieved it? A. Turn it over to the supervisor in charge.

Q. What did he do with it, if you know? A. I don't know just what he did with it.

Q. What would happen to it? A. He would take it and do something with it, hold it for a few minutes, bring it back and give it to us before the trip went out.

Q. Have you and Mr. Johnson, Mr. Folson, had conversations with your superiors on this matter since the subpoenas were served upon you? A. Yes, we had conversations.

[583] Q. With whom did you have these conversations? A. I guess it was the Assistant District Attorney

Q. And with whom else? A. And the supervisor in the post office.

Q. And what is his name, sir?

The Court: I did not hear your question.

Mr. Williams: I asked what is his name.

A. Mr. Singer.

Q. Who? A. Singer.

Q. Singer? A. Yes.

The Court: S-i-n-g-e-r?

The Witness: Singer, yes, sir.

The Court: Very well.

Q. And this is after you were served with subpoenas? A. Yes.

Q. Was there any conversation about what your function was on the mail watch? A. Well, they asked me how we went about it.

Q. Were you ever asked if you retrieved the mail from Majestic Apartments? [584] A. No.

Q. Was that subject discussed? A. No, sir.

Q. Were you advised as to the regulation concerning the delay of mail? A. Yes, I know about the regulation.

Q. Who advised you as to that? A. Well, the supervisor.

Q. What did he say to you? A. They just showed me in the manual that mail is not to be delayed under any circumstances.

The Court: You say the supervisor showed you that. When did he show you that?

The Witness: When we were called to the post office, the General Post Office.

The Court: Was that after you got these subpoenas?

The Witness: After we got the subpoenas.

The Court: Very well.

Q. Was Mr. Johnson with you at that time? A. Yes, Mr. Johnson was with me.

Q. And he showed you the manual, the postal manual, which said that mail was not to be delayed under any circumstances? [585] A. That's right.

Alexander Folson—for Defendant—Direct

Q. Did he show you this at the beginning of the conversation with him, midway in your conversation with him or at the end of your conversation? A. Probably midway in the conversation.

Q. At the time that you were talking to him, was it your impression or your recollection that there had been a delay in Mr. Costello's mail? A. No, sir.

Q. Was that the recollection of your associate, Mr. Johnson, as expressed by him?

The Court: Wait a minute. I will sustain an objection. There are two questions in one.

Mr. Williams: I will rephrase it, your Honor. I realize it is objectionable.

Q. Mr. Folson, did you also have a conversation with somebody in the District Attorney's office on this? A. Yes.

Q. And who was present then? A. Just myself and the District Attorney.

Q. And who else? A. No one else.

Q. Mr. Johnson was not present? [586] A. No.

Q. Did you see the manual at that time? A. No, I didn't see any manual then.

Q. Did you discuss the regulation on the delay? A. We might have gone over the details.

The Court: With the District Attorney?

The Witness: With the District Attorney, yes.

Q. Mr. Folson, I want to ask you this question if his Honor will permit it in the light of your past answers:

Do you deny, sir, that there were occasions when you, Mr. Folson, took Mr. Costello's mail back to the Ansonia branch?

Mr. Christy: I object to that. I think it has been asked and answered twice.

The Court: I will let him ask it again. The objection is overruled. You may answer.

A. I don't recall any time that I took his mail back to the office.

Q. I did not ask you about your recollection. I am asking you if you deny that, sir.

A. To the best of my recollection, I deny it, yes.

Q. To the best of your recollection you deny it? A. Yes, sir.

[587] Q. Did you ever have a conversation with Mr. McKenna about Mr. Costello's mail? A. I don't recall having a conversation with Mr. McKenna.

Q. Have you ever had conversations with Mr. McKenna about the delivery of the mail? A. About whose mail?

Q. Mr. Costello's mail. A. No, sir.

The Court: I didn't hear your answer.

The Witness: I told him "No, sir."

By Mr. Williams:

Q. Have you ever told him there was a watch on Mr. Costello's mail? A. Not to my recollection, I didn't tell him. That was confidential.

Q. Have you ever had in your possession a copy of the order from the Post Office on the mail watch on Mr. Costello? A. No, sir.

Q. Do you know what I am talking about? A. I know what you are talking about.

Q. A memorandum. A. Yes.

[588] Q. You have never had that in your possession? A. I never had it in my possession. That stays in the office all the time.

Q. It stays in the office? A. Yes.

Q. Have you ever had a conversation with Mr. Sulkess on that subject? A. No, sir.

Q. You never had a conversation with Mr. Sulkess or Mr. McKenna— A. No.

Q. —on the subject of Mr. Costello's mail? A. No, sir.

Q. For how long was the watch on, to your knowledge? A. I can't recall. I know they come out for 30 days and, if necessary, it is renewed.

> The Court: Are you talking about generally?
>
> The Witness: Yes, generally they have a watch for 30 days and, if it is necessary, they give you another one for 30 days.

Q. Was there any period of time, Mr. Folson, when the sorters or the clerks were careless about holding out the Costello mail pursuant to the watch and you [589] were told to look for it carefully?

> Mr. Christy: Objection, your Honor.
>
> The Court: I will sustain the objection as to form. You may ask him whether or not there ever came any time when he was asked to double check the clerks.

By Mr. Williams:

Q. Was there ever a time when you were asked to double check the clerks? A. Yes, because they get a watch the same as we do. The clerks get a watch.

Q. Were you ever asked to double check the clerks re Costello's mail? A. Well, since we both had a watch, it was automatically a double check.

By the Court:

Q. Did any of your supervisors ever say to you, either alone or in company with any of the other men that worked

on that, that they thought there had been some carelessness on the part of the clerks who did the sorting and that they wanted you and Mr. Johnson and others like you to give it a second check to make sure that watched mail was not going out without being recorded? [590] A. Well, your Honor, they never told us that directly but there was two watches in, so ordinarily we would have a double check on it.

Q. I know, but you say that the clerks who did the sorting were given the advice to check the mail and you carriers were given it, but the question Mr. Williams wants answered is was there ever an occasion where you were told particularly to be careful because of some fear of carelessness on the part of the clerks who did this work? A. No, there was never any time when they told us that specifically.

The Court: All right.

By Mr. Williams:

Q. Was there ever a time when you recovered an unusual amount of Costello's mail?

Mr. Christy: I object to that question.

The Court: I will sustain the objection as to form because that word "recover" is bothering me.

Mr. Williams: I am sorry, your Honor. I will change that word.

Q. Was there ever a time when you set aside an unusual amount of Costello's mail? [591] A. No, sir.

Q. What was the usual amount of Costello's mail which you would set aside in a normal watch? A. Oh, about one or two a week, something like that, that the clerks might have missed.

Q. That the clerks might have missed? A. Yes.

Q. What was the practice at the Ansonia branch with respect to the dropped mail going out? When did that go out? A. Around 7:15 or 8 o'clock, something like that.

Q. When would you finish your sorting? A. Well, I would say around 7:15. We go by bells, and around 7:15 we have a bell to start to pull your mail in and tie up and take it out.

Q. Did the same bell apply for you as applied for the clerks who were sorting? A. Yes. Usually they stop boxing up mail at that time.

Q. Then any mail you set aside pursuant to the watch would have to go to the supervisor; is that right? A. Yes.

Q. So that the dropped mail would go out before it could be returned to the drop sack; is that right? [592] A. It didn't go out before it was returned to the drop sack.

Q. Was the supervisor always there when you brought the mail over there to be reported? A. We take it to him if he wasn't near around.

Q. Who was the supervisor? A. Oh, different supervisors. I don't know which one you have reference to anyway.

Q. Who was the supervisor who was there in 1950, 1951 and 1952, Mr. Folson? A. I don't even recall the names of them. They come and go so fast, I don't know.

Q. You don't recall the names of any of them during that period? A. I can recall the name of some of the former supervisors but I don't know who was there at this particular time that you have in mind.

Q. Had you ever heard of the regulation, Mr. Folsom, about delaying the mail before the supervisor told you about it? A. Oh, sure.

Q. You had heard about it? A. Sure.

Q. Had you ever heard about it in relationship to [593] a mail watch before he told you about it at your meeting? A. Yes.

Q. You heard about it before? A. Sure.

Q. What was the occasion of his showing it to you, the reason? A. Just to refresh my memory, I guess.

Q. To refresh your memory that it was wrong to delay it; is that right? A. Probably so.

Mr. Williams: That is all, your Honor.

Mr. Christy: I have no questions, your Honor.

The Court: Very well. You may go.

(Witness excusd.)

Mr. Williams: Would you call Mr. Karper, please.

SAMUEL KARPER, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Will you state your address, please, Mr. Karper? [594] A. Home address?

Q. Your home address. A. 54 West 174th Street, Bronx.

Q. How long have you lived there? A. About 18 years.

Q. Where do you work at the present time? A. Ansonia Post Office.

Q. How long have you been an employee of the Postal Department? A. Thirty-seven years.

Q. How long have you been employed at the Ansonia branch? A. Since February 1, 1957.

Q. '57? A. That's right.

Q. What is your job there? A. Superintendent.

Q. Of the Ansonia branch? A. Ansonia branch.

Q. Pursuant to a subpoena, have you produced here certain records on a mail watch on one Frank Costello? A. I have.

The Court: Please keep your voice up, Mr. [595] Karper?

The Witness: Yes.

Q. Do you have those records with you? A. I have.

Q. Are those records kept in the regular order of the business of the Post Office Department? A. Yes.

Q. How far back have you brought these records? A. Well, whatever records I have for the last—from '51 to '54.

Q. From '51 to '54? A. That's right.

Q. Will you show us those records, please, Mr. Karper?

Mr. Christy: Your Honor, I will object to the production of these records. If Mr. Karper can testify to the dates of the mail watch, which I presume Mr. Williams wants, that is perfectly all right, but I don't think he should be required to produce the Post Office records.

By the Court:

Q. Have you any papers in there directing a watch on the mail of a man named Frank Costello, or Mrs. [596] Costello, at 115 Central Park West? A. I have.

Q. Are all of the records you have of that kind, or have you records there that relate to others? A. Just Frank and Loretta.

Q. Frank and Loretta Costello, and they are dated from some time between 1951 and 1954? A. That is right.

Q. May I see them, please? A. These are the originals.

Q. Do you have copies? A. I have.

Q. In what form is the copy—photostats? A. Photostat (handing to Court).

The Court: Have you seen these, Mr. Christy?

Mr. Christy: No, I have not, your Honor.

The Court: You may look at them and then I will hear your argument.

(Handed to Mr. Christy.)

Mr. Christy: I will withdraw my objection.

The Court: Very well.

(Documents handed to Mr. Williams.)

Mr. Christy: Did I understand your Honor to say that the witness had photostats?

[596a] The Court: Yes.

Mr. Williams: May I see them?

The Court: You may look at the original and then, instead of his producing the original, he can produce the photostats.

Suppose we take our recess now, Mr. Williams, and you may have that time then to look at these.

(Short recess.)

[597] Q. Mr. Karper, are these all the records you have pertaining to— A. That is all I have. That is all that was in the files.

Q. What files did you keep on these things? A. Well, that is all I found.

Q. Is there any requirement that you retain the request to put a mail watch on a person? A. No requirement.

Q. No requrement that you keep records? A. That is all I found in the records.

Q. In other words, you found this just loose around the branch? A. No.

Q. Did you have a regular file for mail watches on Costello? A. That is all the file we found on it.

Q. Did you have a manila file of any kind? A. We don't keep manilas. We just keep that that way.

Q. Did you keep that according to the person? A. According to the person.

Q. And that is all that you found? A. Yes.

[598] Q. You didn't find any for 1950? A. No.

Q. Did you look after 1950? A. That is all the files I found. I looked. Nothing else. We made a thorough search.

Q. May I see your subpoena, Mr. Karper? A. (Witness hands to counsel.)

Q. How do you ordinarily keep these records, sir? A. We keep them, file them away; keep them. No set time. We generally keep them for, say, some three years, some four years, some five, some ten, according to different records, according to regulations. I don't know how long.

The Court: Well, is there any regulation requiring orders of this type to be kept for a certain period?

The Witness: No.

The Court: Very well.

Q. Now, Mr. Karper, do you have any other records other than the request to put a watch on which these appear to be? A. That is all.

Q. Showing the dates on which the watch was maintained? [599] A. No other records. That is it.

Q. You have no other records pertaining to the mail watch on the Costellos? A. I have none, no, sir, in my office.

Q. What do you do with respect to the reports that you make to the agency with requests—which requests the watch when you report to them as to the senders of mail and the person who is watched? A. It is sent to the agency requesting it.

Q. Don't you retain a copy of that? A. No, we don't. We were not permitted to—

Q. What is that? A. We don't retain a copy.

Q. In what form is it sent? A. It is a mimeograph form in which we send the return address, the postmark.

Q. And no copy of this is kept by the post office? A. No copy whatsoever.

Q. Now, what does this mimeograph form show? A. The sender's name and postmark.

Q. The sender's name and the receiver's name? A. Well, the receiver's name, we know that.

Q. And then does it show the date? A. Postmark, that is the town, and the date on [600] which it was sent.

Q. Do you have a copy of that form here with you? A. I have not.

Q. Does it have the name of the sender and then the time at which the mail was received by your branch? A. Not my branch. The postmark from the sender's post office.

Q. Does your record show what time that mail left your post office? A. It does not.

Q. It does not? Where were the forms in this particular case sent, if you know? A. I don't.

Q. Do you know what agency they were sent to? A. I wouldn't know.

Q. Well—

The Court: You weren't in the Ansonia office?
The Witness: I wasn't in the Ansonia office.
The Court: At that time?
The Witness: At that time.

Q. Well, is the information sent to the Central [601] Post Office, to the chief inspector who in turn forwards it to the agency? A. The agency that requests that information.

Q. Well, does your Ansonia branch send it to the agency that requests it or do you channel it through your General Post Office here? A. No, we don't channel it through the General Post Office here.

The Court: You send it direct to the requesting agency?
The Witness: To the requesting agency, yes.

Q. Now, did this order indicate which agency had requested the information when it came to your superintendent? Any of these orders (showing witness papers)? A. No.

Q. They say to forward the information to a Mr. Montague, chief inspector, don't they? A. This one doesn't (indicating).

The Court: Speak up, will you, please? I can't hear you.

The Witness: Yes, to the inspector.

Q. Well, then does that refresh your recollection that the information goes to the inspector [602] and then to the agency requesting it? A. Well, it comes—it may come to the inspector's office, but there is an envelope with that, to what agency it is to be sent to.

By the Court:

Q. See if I understand that:

When the request is made, when the inspection division sends this request to you to put a watch on the mail, you say they give you an envelope already addressed to the requesting agency? A. That is right.

Q. And the instruction of the head of the branch is to put those reports in these envelopes and send them out directly? A. That is correct.

Mr. Williams: Your Honor, I would like to ask the witness a question but I would like to get your permission before I ask it lest—

The Court: Well, I can't tell about a question which I haven't heard.

Mr. Williams: Well, in order to test how carefully these records are kept, the subpoena which was served ask for him to produce all the records from

1940 to the present. Now, the only reason for [603] that to the present has some relevancy to this case is because it would be an indication of how carefully the records were kept. I want to see whether or not—he has produced records—only records through 1954, and I would like to ask him whether he has records for 1955 and 1956.

The Court: You may ask him that.

By Mr. Williams:

Q. Did you find records in 1955 and 1956? A. No.

Q. Or 1957? A. I did not.

Q. None at all? A. None at all.

Q. Were there watches kept on Costello during this period? A. I couldn't tell you.

Q. Pardon me? A. I couldn't tell you offhand if we haven't got the record.

Q. Wasn't there a watch on Costello in 1957 only a few months ago? A. Not to my recollection.

Q. You have no recollection on that? [604] A. No recollection.

Q. So you produced everything that you had in your files? A. That is right.

Mr. Williams: Your Honor, I want to offer this, such as it is, at this time as Defendant's—

The Court: Well, you are not going to put the originals in. You can have those marked and then the originals will be returned to the witness and in their place will be substituted the photostats. But now let me see them.

(Papers handed to Court.)

The Court: What is that other paper?

Mr. Williams: That is the subpoena.

The Court: That is no part of this?

Mr. Williams: No.

The Court: All right. Mark those papers separately.

What is the next exhibit number?

(Marked Defendant's Exhibits I-1, I-2 and I-3.)

The Court: What is being marked now is a series of papers which the witness has produced pursuant to the subpoena and which the witness says [605] are all the papers of that kind that he could find in the files of the Ansonia office.

By Mr. Williams:

Q. Mr. Karper, did you have a conversation with Mr. Folson and Mr. Johnson after they received their subpoenas in this case? A. Pertaining to what?

The Court: Pertaining to anything.

The Witness: Well, they are employees of mine.

The Court: Well, did you have a talk with them after they got their subpoenas? Did they come and tell you they got subpoenas?

The Witness: They did. They told me—

The Court: All right. Go ahead.

Q. What did you do after they told you this? A. Well, I had a subpoena, too. I didn't know anything about it, and we searched the records—I searched the records for what you wanted.

Q. Did you discuss with them their testimony at all? A. I did not.

Q. Did you discuss with them the postal regulation or the manual which says that there shall be [606] no delay in the mail? A. That is right.

Q. You did do that? A. Yes. We discussed the regulation. They wished to know the regulation and I discussed that there is no delay in mail.

The Court: Well, that is another question, whether there is or not. But the question you are being asked is did you and these two men, Mr. Johnson and Mr. Folson, have a discussion about the regulations, and what the regulations are and what they require and so on?

The Witness: No.

Q. You did not? A. We discussed the regulation as it is, as we have it in our regulation.

Q. No, no. My question is did you discuss with your employees Folson and Johnson this particular regulation which outlaws delay of mail for any purpose? A. No.

Q. You did not? A. No, not that particular one.

Q. You never discussed the regulation about the delay of mail with them? [607] A. No.

The Court: You mean on this occasion?

Q. On this occasion? A. I don't believe so. We discussed the regulation as it was. The delay of mail is in the regulation.

Q. Sir? A. We didn't—the term delay of mail while a watch is being made is in the regulation, providing there is no delay in the mail. That is part of the regulation.

Q. I understand. Did you discuss that specific part of the regulation? A. No.

Q. With these men? A. No.

Q. You did not? A. No.

Q. That particular subject did not come up in your discussion with them, is that right? A. That is right.

Q. What did you discuss with them? A. The regulations.

Q. The regulations in general? [608] A. In general.

The Court: But leaving out that one?

The Witness: No. We discussed it: the term

delay in the mail is in that regulation.

The Court: Well, then, you did discuss the question of not delaying the mail through a watch, isn't that so?

The Witness: Yes.

Q. Well, what was the reason for your calling this regulation to their attention? A. Well, when we receive a subpoena for a watch, which is something which we got now, we discuss the regulation pertaining to the particular subject.

Q. Now, when you discussed it with them did you ask them about their recollection concerning the watch? A. I did.

Q. Did you ask them whether or not the watch had delayed the mail? A. I did. I did ask them.

Q. You did? A. Yes.

Q. Did they respond to your question? A. They did.

[609] Q. And was their response to your question the occasion for your calling the regulation to their attention? A. I don't follow you there.

Q. Well, was the answer—

The Court: Well, what was the answer that they gave?

The Witness: That they never delayed the mail.

The Court: They didn't delay the mail.

The Witness: No.

Q. What was the reason for your calling the regulation on the delay of the mail to their attention?

Mr. Christy: Your Honor, he has just answered that question.

The Court: All right. I will allow it.

A. Repeat the question.

Q. What was the necessity or reason for calling it to their attention? A. Well, the regulation in itself, the entire regulation has delay in the mail in that entire regulation, pertaining to the particular subject, and I asked them had they—I wasn't there at that [610] particular time—and I asked them did they ever delay the mail or ever do anything like that and they said they never did.

Q. Now— A. There was no reason for delay in the mail. We don't hold with this unless there is no delay in the mail.

Q. Mr. Karper, you have two kinds of mail, have you not? Mail that is dropped at buildings in sacks and mail that is specifically delivered to homes? A. That is right.

Q. Or apartments? A. That is right.

Q. Now, are there occasion when you ask the mail sorter at any apartment to set aside mail for you? A. Well, there is a watch placed on top of the case where the dropped mail is being worked which specifies the withholding of that particular mail for that house, and the clerk who receives that does the same thing as the carrier would, gives it to the supervisor; he gives that letter to the supervisor who makes an entry on a mimeographed form the same [611] as a carrier would when he receives a letter, and it is returned —the carrier does.

Q. Returned to your case? A. On the carrier's case there is a bag and it is tied up in a bag, and it goes to that building.

Q. I don't think you understood my question. It probably wasn't clear. I asked you whether there was ever an occasion, or whether it is the practice of the department or your branch of the department, to be more specific, to ask the mail clerk at private buildings where the mail is dropped— A. Private buildings?

Q. Yes, to aid in a mail watch? A. Never. This is confidential. This is confidential between the department and myself. My orders are to the assistants and the carriers.

The Court: Well, so that we will get some place let me put a couple of questions here.

Do you mind, Mr. Williams.

Mr. Williams: No.

By the Court:

Q. At 115 Central Park West there is a man employed there to act as, what he calls, a mail [612] clerk, and he has told us here that the mail, ordinary mail, that is, all mail except registered mail— A. Yes.

Q. —is delivered to that house in bags by a truck? A. That is right.

Q. And that it is his duty when that mail comes in bags, to sort it according to the various tenants and effect delivery to the tenants in the apartments? A. Yes.

Q. He has told us that on two occasions there were mail watches being carried on by the post office with respect to the mail to be delivered to either Frank Costello or his wife. He has told us that at least on one occasion, and he thinks too, that the carrier assigned to that district asked the mail clerk employed in the house not to deliver any mail that came in the sack to the Costellos but to segregate it and give it back to the carrier so that he could take it back to the post office and have it rechecked.

McKenna says that the post officer carrier, the postal carrier said the reason he was making that [613] request was that there was a fear on the part of some supervisor in the Ansonia office that the clerks and the carriers had not been careful in checking the Costellos' mail and they wanted to make sure that they were not overlooking it.

Now, did any situation like that ever occur in the Ansonia office since you have been there? A. Never.

Q. You told us you were in the post office for some 37 years? A. 37 years. It has never occurred.

Q. Have you ever heard of that being done at any place? A. Well, the carrier jeopardizes his job—

Q. Well, have you heard of that being done, whether it jeojardizes his job or not? A. No.

The Court: All right. Let us go along.

Q. Did you ask Folson or Johnson whether such a thing happened? A. No. I didn't know about that.

Q. I am sorry? A. I didn't know about that.

Q. You didn't ask them? [614] A. I didn't ask them.

Q. Whether they had retrieved mail from 115 Central Park West? A. That is right.

By the Court:

Q. I take it by your answer saying you didn't know about that, you mean you had no idea that it had ever been done? A. That is right.

Q. And you didn't ask them whether it had ever happened? A. That is right.

Mr. Williams: No.
The Court: All right.
Do you have any further questions?
Mr. Williams: No.

Cross-examination by Mr. Christy:

Q. Mr. Karper, when a mail watch is requested it lasts for 15 days, is that not right? A. That is right.

Q. And if there is to be a mail watch, a subsequent mail watch you must have another request? A. That is right.

Q. The mail watches which are reflected in Defendant's Exhibit I give the dates when the mail [615] watch was requested? A. That is right.

Q. And each one of those would last for only 15 days? A. That particular one, that is right.

Mr. Christy: I have no further questions, your Honor. We do have the problem of Mr. Karper's records.

The Witness: I want the originals back.

Mr. Williams: Your Honor, one of the things called for, and I simply call this to your Honor's attention for guidance, by our subpoena served upon the witness Leath for production here at the hearing—

The Court: Mr. who?

Mr. Williams: Mr. Leath.

The Court: The treasury agent of the Internal Revenue?

Mr. Williams: Yes. We called for records which would include a request for mail watch and we called for them unwittingly because the subpoena is broad enough to call for that information.

Now, it seems to me that since we have a situation here where the records of the department are concededly not adequate to give us the whole [616] picture—

Mr. Christy: I have not conceded that. There has been no testimony on it, your Honor.

Mr. Williams: All right. May I finish? Where the records are—

The Court: All that the record shows, Mr. Williams, is that you have been disappointed a little bit. You asked for a lot of records and you expected to get more than the witness was able to produce?

Mr. Williams: Yes. And Mr. Geissler has testified that there was a mail watch on in 1950 in this case.

The Court: Now, I don't know whether he testified with that precision. My recollection of Geissler's testimony is that he was not quite clear. However, go ahead.

Mr. Williams: Now, it seems to me that it would be in the interest of justice if that portion of the subpoena were complied with so that we could see what requests were made of the postal department for mail watches by the Bureau of Internal Revenue, because their records may be better than the postal department on this subject.

[617] The Court: Is Mr. Leath here? Have you made any search for such documents?

Mr. Leath: Yes, sir. I went through the files, and as they now stand, there are no specific requests for mail watches.

The Court: Are there any other kinds of requests other than what you characterize as specific?

Mr. Leath: Well, no, sir. What I am referring to is the fact that going through the files I did not find any copies of requests to the Post Office Department for a mail watch of Mr. Costello's mail.

Mr. Williams: The other suggestion I have, your Honor, is that the report from the Post Office to the Bureau giving the names of the senders of the mail to Costello would show us when the watches were on, and presumably those records are in the possession of the Bureau of Internal Revenue.

The Court: We will find out if they are.

Did you make any search for those?

Mr. Leath: Yes. They are in the possession of Mr. Christy.

The Court: Do you have them, Mr. Christy?

[618] Mr. Christy: I do, your Honor, but they do not reflect except in isolated instances the dates when the mail watches, when these cards were received; in other words, when the mail watch was on. Some of the forms that were returned do have dates but most of them do not have any date on them whatsoever.

The Court: Very well.

Mr. Williams: Your Honor, my recollection of the testimony and my understanding of the record that is sent from the post office to the requesting agency is that the postmark is contained—

The Court: That is what the last witness just testified to.

Mr. Williams: Yes. So that the postmark would give us the guidance we are looking for as to the real scope of the mail watch, and whether it is more extensive than the record of the post office indicate. So I think the record that Mr. Christy talks about would be most germane at this point.

The Court: Well—

Mr. Christy: I looked at the record, your Honor. The only dates I find as I recall are dates put on there when these forms were received. The [619] only dates I recall among those forms were 1951 and 1952. I don't recall any other dates.

The Court: Let us get this last man back, this witness Karper.

By the Court:

Q. Mr. Karper, when you were on the stand and you were testifying about how these mail watches are conducted and what records are made, my recollection is that you told us that the clerk or the carrier finding a letter addressed to the person whose mail was being watched would bring that letter to the supervisor or the foreman or the superintendent, whoever happened to be handling that matter at the time, and that it was then his duty and custom in the department for that man to make an entry showing for instance the mail cover, in this case of Frank Costello? A. Yes.

Q. And a letter to Costello, and then he would record the name of the sender of the letter if it appeared on the envelope together with that person's address and also the postmark? A. Postmark and date.

Q. Postmark and date? [620] A. Our postmark.

Q. The date of the postmark appearing on the letter, not merely the postmark indicating that it came from the town, or the City of Chicago or Los Angeles or something like that, but also the date on which that post office was placed on by by the post office that first received the letter for delivery? A. That is right.

The Court: Very well.

All right.

(Discussion re returning original papers to witness.)

[621] The Court: Do those dates appear on those reports that you have, Mr. Christy?

Mr. Christy: I have not seen any yet, your Honor.

The Court: Let me see them a moment.

(Mr. Christy hands documents to Court.)

The Court: Now the request is for the delivery of those to Mr. Williams. What have you to say about that?

Mr. Christy: I object to the production of these records.

The Court: Why?

Mr. Christy: These are confidential papers of the Treasury Department and no foundation has been laid for the production of these papers, and I can't conceive any grounds on which the defendant is entitled to see these.

The Court: Well, it has been established that there was an order to watch the mail of this man; there has been testimony that that order was carried

out. Presumably the department received the information which it requested.

There has already gone into evidence without objection—not that the objection would have made [622] any difference, because I think I indicated to you I was going to permit the orders themselves to go in, and everything about this case so far has been made available to the defendant. I see no reason why these should not.

Mr. Christy: Your Honor, it seems to me that certainly before these should be produced they have to be related to some witnesses during the trial. This is the file of the mail watch or the results of the mail watch put on by the Post Office and it contains a great many names and addresses, many of which—most of which have absolutely no relation to this case.

I don't see that the defendant is in any way entitled to look through these records at this time.

The Court: How can you tell whether they have a relation to the case or not? I can't tell. I don't know that you can tell right now. Maybe you can.

The defendant has raised a question here that his rights have been invaded and he has been denied either—I am not going to try to limit the number of rights that he says have been invaded here, but one of the ways in which he says they have been invaded is by the use of illegally obtained evidence, or evidence, [623] rather, obtained by illegal tapping of his telephone and illegal use of such information by Government agents.

Another way he says is that it was obtained by some interference with his mail and that as a result of that the Government got data which led to evidence which was used against him in his income tax case.

Now we have ruled up to now that he is entitled to go into that and we have given him a great deal of information and a good deal of it, I think, you consented to, but that isn't the point. I am not putting it on the basis that you have consented to it. I don't want to make it appear that you have done anything but carry out your full duty as an Assistant United States Attorney, but I am inclined to think that he ought to have all of these matters that the Internal Revenue Bureau secured as a result of this mail cover.

If you have some very good reason why any particular part of that should not be made available to him, I will give you tonight to look it over very carefully and you may argue to me tomorrow morning why any part of it should not be given to him. Otherwise, I think the ruling is going to be that he is going to [624] get all of it.

Mr. Christy: Very well, sir.

The Court: Now we have about 20 minutes, Mr. Williams. Do you have another witness that you might put on?

Mr. Williams: Yes, sir.

(Witness excused).

Mr. Williams: Call Mr. Comiskey, please.

The Court: Here are those orders, Mr. Williams, Exhibits I-1 through 7.

Would you be good enough to have somebody of the staff make a schedule of what dates those various items cover, like I-1 covers such and such a date?

Mr. Williams: Yes, your Honor, overnight.

The Court: All right. I don't want it now.

Walter R. Comiskey—for Defendant—Direct

WALTER R. COMISKEY, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Comiskey? A. Port Washington, Long Island.

Q. How long have you lived there? A. Oh, I would say about 40 years.

[625] Q. What is your present street address, sir? A. 126 Reade Avenue.

Q. And what is your occupation? A. I am the postmaster of Port Washington.

Q. How long have you been so occupied? A. Eleven years.

Q. At the same post office? A. Same post office.

Q. Is the post office at Port Washington the post office which serves Sands Point? A. That's right.

Q. Do you cover a street called Barkers Road in Sands Point? A. We do.

Q. Have you produced here pursuant to a subpoena such records as are in your possession at the post office concerning the mail watch or mail cover on the Costellos at Barkers Road, Sands Point, Long Island?

The Witness: Your Honor, I will have to refuse to answer that unless I am so ordered by the Court.

The Court: You are ordered now to say whether or not you have produced them.

A. May I have that question again?

[626] Q. I say, Mr. Comiskey, have you puroduced here pursuant to the subpoena served upon you such records as you have relating to a mail watch or mail cover on the Costellos at Sands Point, Long Island? A. I have a document here.

The Court: You have a document here which you claim is being produced pursuant to the subpoena served on you?

The Witness: It is a copy of the original document.

The Court: Very well.

Q. What is that document, Mr. Comiskey?

The Witness: Am I so ordered to answer that?

The Court: Yes.

A. This is an order on a mail watch.

Q. What is the date of that order? A. That is dated June 27, 1952.

The Court: What is that again?

The Witness: June 27, 1952.

Q. Do you have any other orders than the one you have just described? A. It is the only order I can recall or can produce.

Q. Do you keep these records—

[627] The Court: Pardon me just a moment. Read the answer.

(Answer read.)

By Mr. Williams:

Q. Do you keep these records, Mr. Comiskey, in the regular course of business in the Post Office Department? A. We keep them for various periods, say, three years, five years.

Q. How long do you keep them out there? A. Well, ordinarily I wouldn't even keep this if it was up to me. We have no regulation on it.

Q. Then this was not kept in the regular course of business, this record? A. Yes, this one. I searched through the records and found this. Evidently it had not been disposed of.

Q. Are there others that have been disposed of? A. To my knowledge, no.

Q. Well—

By the Court:

Q. You say you have been there 11 years? A. Eleven years.

Q. Since 1946. Very well. [628] A. First of October.

Q. First of all, during those 11 years have there been occasions when orders were issued to conduct a watch on mail of individuals? A. Yes, there has been.

Q. And is it your function as postmaster there to issue that order or to be familiar with the orders if one of your deputies orders it? A. I pass that on to a supervisor to take care of.

Q. That is the kind of thing as a postmaster you would concern yourself with? A. Yes, it comes to me.

Q. Do you recall any other order for the watch of mail on the Costellos at Sands Point than the one which you are producing here? A. I do not.

The Court: Very well.

By Mr. Williams:

Q. Did you recall that one, Mr. Comiskey, absent the finding of the record? A. Yes, I remembered that we had one.

Q. You remembered that you had one? A. Yes.

[629] Q. And is your recollection precise enough— A. Very good.

Q. —to fix a date on that one? A. I couldn't recall the time, but I knew I could look back until I found it, but I knew that there was one, the only one I remembered.

Q. May I see the record on that, sir?

Mr. Christy: I object to it, your Honor.
The Court: Overruled.
(Handed to Mr. Williams by witness.)

By Mr. Williams:

Q. Are those copies of it? A. Yes.

Q. Are they copies of the same order? A. This is copies of the same order.

Q. Now, do you keep renewals of an order of this kind? A. I don't get you on that.

Q. Are there such things as renewals of a mail watch order? A. No. Every one is a separate order.

Q. I see. There is no such thing as a continuing order or a renewal of an order? A. No.

[630] Q. May I see those, Mr. Comiskey? A. This is a duplicate of that one (handing).

Q. Are they different ones? A. This isn't a copy. This is a regulation.

Q. And that is the subpoena. I see.

Now, Mr. Comiskey, did you comply with this order? A. Yes, we did.

Q. Did you furnish the inspector, Mr. Montague, or the Bureau of Internal Revenue, with the names of the senders of mail to the Costellos? A. We only furnished this to the inspector in charge who signed the order.

Q. In other words, the practice is to give the information requested to the inspector here in New York? A. If he issues the order.

Q. That is Inspector Montague; is that right? A. If he signed that, that is him.

Q. Is now and was then at the time; is that correct? The recorder doesn't get the nod of your head? A. Will you say that again?

Q. I say, Inspector Montague held the same job then [631] as he holds now, did he not? A. If his signature is on there, he did.

Q. Did you keep a record of the report you made to the inspector in charge giving the names and addresses of the senders of mail to the Costellos? A. No.

Q. You did not? Is it not the regula practice to do that? A. No, not my practice.

Q. In other words, you just send the report in and you don't— A. I furnish the information requested.

Q. What is the fact with respect to the Costellos at Sands Point? Did they have a mail box into which their mail was put? A. Where?

Q. At the Port Washington Post Office. A. Yes, he had a box, a post office box.

Q. So that his mail was not delivered to his home? A. No.

Q. Did you flag that box that the mail was not to be entered into the box until a record was made of it? A. I have a supervisor that takes care of that.

[632] Q. Who is that? A. He intercepts that mail.

Q. Who is that, sir? A. Well, I can't recall at the time who I gave it to.

Q. Was it a Mr. Ehmat? A. It might have been.

Q. In other words, when you say you have a supervisor who does that, you are using that as a class designation rather than a specific person; is that right? A. Well, I do that because it is not handled by my ordinary employees. It has to be a supervisory employee. We don't even trust that work to anybody.

Q. So that the clerk who is sorting mail turns that mail over to the supervisory employee; is that correct? A. Well, in this specific instance I would have to say that I can't recall just how we did it that day.

By the Court:

Q. You have told us, Mr. Postmaster, that there were other similar orders issued during your incumbency, and what Mr. Williams is asking you is what the practice is. [633] A. Well, the mail is withdrawn. For instance, if it is box mail, which in this case it would be box mail, it is withheld until we get the information we are looking for.

Q. Yes, but what Mr. Williams wants to know is was there a flag or some warning put on that box that belonged to the Costellos so as to advise any clerk who might be sorting mail which would go in there to not put that mail in the box until he was sure it had been— A. We had that mail for that particular box placed on the supervisor's desk before it was boxed.

The Court: I see.

By Mr. Williams:

Q. It would be placed on his desk; is that correct? A. Yes.

Q. And then he would be expected in the normal course of his duties during the day to record the addresses? A. Let me correct you there. We do not delay anybody's mail.

Q. I didn't ask you if you delayed anybody's mail. A. You are inferring it. You said in the course of the day. That mail would be available at any time [634] that he wanted to pick it up. There is no delay in the mail. I want you to understand that.

Q. You mean it would be available to him if he went to his box and opened it and the mail was lying on the supervisor's desk?

Mr. Christy: Objection, your Honor.

A. It would be in his box before he was able to get it out of his box. Do you understand me?

Q. I certainly do. A. You are inferring that that may lay there all day and be put in the box the next day. That is not true.

Q. Excuse me, Mr. Comiskey. I am not inferring anything. I am just trying to find out what your practice is. A. I am only trying to bring out in my office nobody's mail is delayed.

The Court: That record is clear now. At least there have been no admissions against interest. Let's get on.

Mr. Williams: I have no further questions of this witness, your Honor.

The Court: Did you intend to make any offer with respect to this?

[635] Mr. Williams: Yes, your Honor, I overlooked the order. I suppose that will be Defendant's J.

The Clerk: For identification?

Mr. Williams: I am offering it.

Mr. Christy: No objection to that, your Honor.

(Defendant's Exhibit J received in evidence.)

The Court: What is the date of that?

The Clerk: June 27, 1952.

Cross-examination by Mr. Christy:

Q. Mr. Comiskey, a mail watch ran for only days; is that correct? A. If the order so states, that is correct.

Q. And you did not continue it beyond 15 days? A. No.

Mr. Christy: No further questions.

Mr. Williams: I have no questions.

Colloquy

The Court: You may go.

(Witness excused.)

Mr. Williams: Your Honor, I can hardly make a start on the next witness if we are going to adjourn at the regular time.

The Court: I am willing to sit a little later if you think you can finish another witness, because [636] I am going to have to ask you to indulge me tomorrow because I have to attend a funeral of an old friend at 10 o'clock. We will start here at 11:15. I hope that delay won't inconvenience anybody.

Mr. Williams: I don't think I can, your Honor.

The Court: It is all right.

Anything else?

Mr. Williams: No, your Honor.

The Court: I saw your associate conferring with you. I thought there might be something else you wanted to take up.

Very well. 11:15 tomorrow morning.

(Adjourned to 11:15 A. M., October 9, 1957.)

New York, October 9, 1957,
11:15 o'clock A. M.

(Hearing resumed.)

(The following proceedings took place in the robing room.)

Mr. Williams: Judge, in the interest of tidiness, I have had our motion redrafted so it would incorporate everything, and it is en route here, which I will file and serve on Mr. Christy, and I thought, since this point did arise for the first time yesterday, in the interest of fairness I should tell Mr. Christy at the earliest moment and for the record that one of the arguments that I propose to make on the law on this point, and which I hope to have briefed for your Honor and for Mr. Christy at the earliest

possible time, is that the practice of screening the income tax returns of prospective jurors is a practice which cannot be condoned by the Court in the exercise [638] of its supervisory function over the conduct of litigants in that it has the effect of intimidating prospective jurors and rendering them less amenable to jury service and also intimidating them with respect to returning a verdict of acquittal in a case in which the Government is a party litigant, and especially in an income tax case in which the Bureau of Internal Revenue has a clear interest.

I wanted to tell Mr. Christy and your Honor that that is one of the arguments that I propose to make in brief, so that I won't make an argument he is not apprised of.

Mr. Christy: Your Honor, one thing I think we might bring up. I received a call this morning from Henry Montague, who is the postal inspector here in New York, and he advised me that Mr. Williams had served some subpoenas on people from the Ansonia Station last night; that apparently not all the subpoenas which Mr. Williams wished to serve were served.

The Post Office has a regulation that when a subpoena is to be served on a carrier and the person serving it brings it to the station, that the subpoena is to be referred to the General Post Office, so presumably those persons called for in those subpoenas [639] would not appear at the time called for in the subpoena, this morning.

I don't know how many of them there are or who they are, but I thought I ought to advise Mr. Williams of this.

Mr. Williams: That explains the absence of some of the people I expected to call, but we will be able to go forward and see what we can do about getting them here at the earliest time.

The Court: All right.

Frank J. Pignataro—for Defendant—Direct

[640] (The following proceedings took place in the courtroom:)

FRANK J. PIGNATARO, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Pignataro? A. 975 East 226th Street, Bronx.

Q. How long have you lived at that address? A. 12 years.

Q. Where are you presently employed? A. Ansonia Post Office.

Q. The Ansonia branch of the Post Office Department? A. Yes, sir.

Q. That is here in New York? A. Yes, sir.

Q. How long have you been so employed? A. For the post office about 12 years.

Q. About 12 years? A. Yes, sir.

Q. How long have you been employed at the Ansonia branch? [641] A. About eight or nine years.

Q. In what capacity are you employed there? A. A clerk.

Q. What are your duties as a clerk? A. Distributor and boxing up mail during the night, first class mail.

Q. Mr. Pignataro, are you familiar with the term mail cover or mail watch? A. Yes, sir.

Q. Now, during the years when you were working at the Ansonia branch of the post office can you tell us whether there was a mail watch on the Costellos at 115 Central Park West? A. Yes, sir, there was.

Q. Can you fix in point of time approximately when that was? A. About four or five years ago.

Q. Well, can you tell us what year or what years that watch was on? A. 1952, 1951, I think, 1953.

The Court: 1951, did you say, and 1952?
The Witness: Yes, 1953.

Q. Now, would you tell us what the practice is with respect to the sorting of mail on which there is a watch or a cover? [642] A. Well, as you sort the mail, if you come across one of these letters supposed to be watched you are supposed to hold that out and put it on the supervisor's desk.

Q. Now, will you tell us what the practice was with respect to mail that went into the drop bags? Do you know what I mean? A. Yes.

Q. Where the mail was delivered to an apartment house or hotel in a drop sack and segregated? A. Well, the mail for the drop sacks and for the hotels, they have their separate boxes for them because they get too much mail. They get about two or three thousand pieces a day. So in the morning when you get the final bell for the carriers to pick up their last mail we pick up the dropped mail and we are supposed to tie it up and put it in the drop sack.

Q. What, if anything, did you do with respect to the watch mail that goes into or assigned to go into the drop sack at this time? A. Well, with the mail that is supposed to be watched, as we pick up this mail for a certain hotel, we have to verify every piece and pull out—

[643] Q. Now, when do you make that segregation of watch mail which would go into the drop sack for a hotel or apartment house? A. You make it just before the trip goes out.

Q. Do you make it during the night or at the end of a tour? A. You usually make it near the end of the tour.

Q. What do you do with it after you make the segregation? A. Well, you tie up the bundles that are supposed to go out, and you take the mail you are holding out and you leave it on the supervisor's desk.

Q. Now, is this practice you are discussing at the moment the general practice among the clerks or is it your peculiar practice? A. All the clerks do do it.

Frank J. Pignataro—for Defendant—Cross

Q. Now, when does the watch mail or the cover mail go to the supervisor's desk, the watched mail which is uncovered during the night watch? A. Well, they get the final bell about a quarter to eight. I should say any time after eight o'clock.

Q. Now, Mr. Pignataro, would you tell us what effect that has with respect to the watched mail making [644] the morning delivery? A. Well, I don't think the watched mail makes that first drop trip. If you are tying up the bundles and putting them in the bag and you are holding out the other mail, the bundles you are tying, they are gone.

Q. What is your experience with respect to that matter? A. Well, the drop trip has to go right out on time. So the held mail doesn't make it.

Q. Now, was that true in 1950, 1951 and 1952? A. Yes, sir.

Q. Is it true now? A. Yes, sir.

The Court: I didn't hear that last answer.

The Witness: Yes, sir.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. Mr. Pignataro, you are a clerk? A. Yes, sir.

Q. And in those years, 1950, 1951 and 1952, when did you report to work in the morning? A. I worked on the midnight tour.

Q. Midnight to— [645] A. 8:30 in the morning.

Q. Now, during this time mail would come into the post office? A. Yes, sir.

Q. And I take it it was one of your jobs to sort the mail? A. Yes, to box it up.

Q. To box it up? A. Yes.

Q. In other words, you had a lot of letters and you would distribute them into the various boxes? A. That is right.

Frank J. Pignataro—for Defendant—Cross

By the Court:

Q. How were those boxes set up? Was there a box for each group? A. Yes, there is a box for each route, and the heavy hotels have separate boxes.

Q. Yes, I understand that. You told us that. But otherwise the other boxes would be a box for each group? A. Each carrier route.

The Court: Each carrier route? All right.

[646] Q. As you are separating this mail and putting it into the routes or into the particular box on the route, I take it you hold out any letters addressed to a person on whom there was a mail watch? A. Yes, if you happen to run across it.

Q. You would withhold it? A. That's right.

Q. And at the time you get through sorting it, would you then take it to the supervisor? A. Yes, you would lay it on his desk.

Q. And what did the supervisor do with it? A. Well, you just leave it on the desk, they leave you orders to leave it on the desk, and you walk away.

Q. So that you don't know whether or not that mail went out on the first delivery or not? A. Well, any mail picked up during the night I wouldn't know.

Q. You wouldn't know? A. No.

Q. The supervisor might examine these letters and put them back in the drop and they would go out with the sack; right? A. He would not put them back in the drop because [647] we verify it in the morning and pull it out again.

Q. What do you do? A. In the morning they have a special box for the hotel. We have to take that mail out and look over every piece and pull that mail out, so he wouldn't put it back in the drop.

Q. I don't quite understand you. Would you explain that? During the night you put mail into the box for 115 Central Park West? A. That is right.

Q. And you withheld letters and put them on the supervisor's desk? A. As a rule when you are boxing up you don't read names, you read addresses. That is the purpose of checking the mail over again in the morning. In the morning, after you are through boxing up on the final bell, you are supposed to help the mail get out, you skin out these side boxes and then you check every piece and pull out the mail.

Q. Then do I understand that when you are separating it into boxes you are not looking for letters addressed to the person on whom there was a mail watch? A. As you are boxing up very fast, you are just [648] interested in addresses.

Q. When do you pull out the mail on which there is a mail watch? A. When they get the final bell in the morning. When you stop boxing up, they will tell you, "Skin out 115" or "Ansonia Hotel and verify it."

Q. You mean if you have 2000 pieces of mail in the 115 Central Park West box, you then go through all that mail again to see if there is any mail for a person on whom there is a watch? A. That is right.

Q. How long does that take you? A. About 15 minutes.

Q. And then what do you do with it? A. Then you tie up the rest of the mail and you take that hold-out mail and you put it on the boss' desk.

Q. And do you know what happens to the mail then? A. Well, the mail I tie out I know goes out.

Q. Goes out? A. Yes.

Q. What happens to the mail that you leave on the supervisor's desk? A. It stays there.

[649] Q. For how long? A. I leave at 8:30. I don't know.

Q. Is it still there? A. I imagine so.

The Court: What is that?

Q. What is that? A. I said I think so.

Frank J. Pignataro—for Defendant—Cross

Q. Have you ever pulled a letter out addressed to Frank Costello and left it on the supervisor's desk and then seen it when you left? A. Well, I didn't make it my job to see if it was there when I left.

Q. So you don't know whether it was still there when you left; right? A. I don't know if it was still there, but I know when the drop trip went out it was still there.

Q. The carrier goes out about the same time—

The Court: Wait a minute.

By the Court:

Q. You say you know that. You mean you know of your own knowledge that what you call drop mail went out without getting any of the watched letters that would belong in that drop bag? A. Yes, sir.

[650] Q. How would you know that? A. Well, the fellow that takes out the drop mail, he pulls up a skid with the sacks and puts the drop mail in it. Sometimes we would be late on tying and he would be waiting and we would tie the bundles and he would take off.

By Mr. Christy:

Q. How would you know that the supervisor hadn't put these back in the drop? A. Because we just tied out the drop.

By the Court:

Q. What do you mean by tying out the drop? Do you meaning closing the bag? A. Well, you can't put the letters in in the bag loose because there are so many. You have to tie like bundles of a hundred, 150 letters with the addresses.

Q. That is what you mean by tying? A. Yes.

Q. In other words, if there were 2000 letters, you would take bundles of 100 letters or so and tie them up and drop them in in bundles? A. Yes.

Q. And that is the last thing you do? A. Yes. Well, I might do something after that.

[651] Q. That is the end of it before the bag goes out? A. Yes.

The Court: I see.

By Mr. Christy:

Q. So you are not in a position to state that these letters which you withdrew were not put back in the drop, are you? A. No, not exactly.

Q. The answer is no? A. I imagine so, if you say so.

Q. I am not saying so.

The Court: You don't recall, is that what you are saying, any instance where the supervisor came and dropped mail in?

The Witness: No, I don't.

The Court: And you think that it did not get in under those circumstances?

The Witness: No.

The Court: Very well.

Q. Now, the carrier went out about the same time as the drop; is that right? A. Yes, sir.

Q. So it is perfectly possible that the supervisor [652] gave the mail to the carrier? A. It is possible.

Q. And in that event there wouldn't be any delay? A. Well, from watching the drop mail, when you throw the mail on the desk that late they have to write it up and that takes time.

Q. As far as you know, the carrier may have taken out this mail? A. Yes, sir.

Frank J. Pignataro—for Defendant—Redirect

Mr. Christy: I have no further questions, your Honor.

The Court: Very well.

Have you any further questions?

Mr. Williams: I have one or two questions.

The Court: Go ahead.

Redirect examination by Mr. Williams:

Q. How long, approximately, did the resegregation of the 115 Central Park West box take you on the average, Mr. Pignataro? A. Well, if it was very heavy it would take about 20 minutes.

Q. And that would be done, as I understand it, at the end of your tour of duty? A. Yes, sir. If it was too heavy they would put [653] more than one clerk on it.

The Court: You don't mean your tour of duty, you mean just before the bag is scheduled to go out.

The Witness: Yes, sir.

By Mr. Williams:

Q. And after you had resegregated it and set aside the watched mail, do I understand that you then put all the 115 Central Park West mail in a bag? A. Yes, sir.

Q. Is that right? A. Yes

Q. Did somebody pick that bag up? A. Yes, sir.

Q. Is that right? A. That's right.

Q. But in that bag was not the watched mail; is that correct? A. Right.

Q. The watched mail would then go to the supervisor's desk? A. Yes, sir.

Q. And in the normal course of a day's business, can you tell us approximately how much mail would be on the supervisor's desk for recording? [654] A. The desk was always a shambles there. They had broken packages on it,

letters. I don't know. They have letters that are torn open by the cancelling machine and have to be patched up. There might be 20, 25 pieces, not counting the parcels.

The Court: But the question you were asked is do you know and, if you do, can you tell us how many pieces of watched mail would be on the supervisor's desk?

The Witness: Oh, about eight or ten a day sometimes less; sometimes more.

By Mr. Williams:

Q. Now, at the time that the watched mail was put on his desk, had the drop sack gone to the truck? A. Yes, sir.

Q. Mr. Pignataro—

The Court: Just a moment. Let me see if I get it clear here.

By the Court:

Q. As you went through and resegregated this mail, you took out the watched mail and set it aside at your counter? A. Yes, sir.

Q. Then is it your testimony now that you just [655] left that lying on your counter until the dropped mail was tied up, dropped back in the bag and the bag tied up and somebody took it away? A. Yes, sir.

Q. And then it wasn't until that was done that you brought the watched mail over to the supervisor? A. That's right.

The Court: I see.

Mr. Williams: That is all, your Honor.

Mr. Christy: No further questions, your Honor

The Court: Do you mind if I ask a couple of questions?

Frank J. Pigg·taro—for Defendant—Redirect

By the Court:

Q. You have been working for 12 years for the Post Office? A. Yes, sir.

Q. And is it part of your duty to be familiar with regulations as to the handling of mail? A. Yes, sir.

Q. Are you aware or do you know whether there is a regulation with respect to attempting, as far as you can, to make sure that mail is not delayed in delivery? [656] A. I think there is a regulation.

Q. Do you have any doubt about it? A. No, sir, because we don't actually deliver the mail. We just—

Q. No, but is there a regulation that the mail has to be moved along quickly and isn't everybody in the post office instructed to move the mail along so that it is delivered promptly? A. Yes, sir.

Q. Has it been your practice with respect to what you call drop mail always to leave the watched mail aside until the drop mail bags go out? A. Well, in that particular phase of the duty that you have to get the mail out, you have to.

Q. I am asking you, has it always been your practice wherever you are handling drop mail to put aside watched mail and hold it on your counter until after the bag of drop mail had left your station? A. Well, I don't hold it on my counter because when we work the drop mail we take it over to the main table and work it.

Q. Well, wherever you work it, there comes a time when you have some watched mail? A. Yes.

[657] Q. And that, I understand, you leave to one side, either on the main table or at your counter? A. Well, you have to because—

Q. Well, is it a fact, whether you have to or not? Is that what you do? A. Yes, sir.

Q. Has that been your practice all the time? A. Working the drop mail, yes, sir.

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

FRANK COSTELLO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

(Vol. II—Pages 409a - 804a, Incl.)

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Frank J. Pignataro—for Defendant—Redirect

Q. So that in every instance where you handled drop mail, if there was any watched mail you left the watched mail aside and let the bag of drop mail go out without having the watched mail in it; is that so? A. No, sir.

Q. Explain that to me. A. As we work this bag table and I am pulling out the drops, tying out the drops and pulling out the watched mail, if I find a piece of watched mail, I don't run down a block to deliver it on the supervisor's desk. I tie out all my bundles. When I have all the bundles tied, I pick them up, throw them in the bag and I pick up the watched mail and deliver it promptly to the supervisor's desk.

Q. Yes, but you have just told Mr. Williams in answer to a question of his that, with respect to this [658] drop mail for 115 Central Park West, the bag of drop mail always left the station before you delivered the watched mail over to the supervisor. A. Well, that was the purpose when they give you the bell. When they tell you—

Q. But is that what you did? A. Yes, sir. I was following orders.

Q. I am trying to find out what happens here.

Did anybody at any time ever suggest to you that that was delaying the delivery of the mail and that you ought to find some other way to handle it? A. No. sir.

Q. Very well. That is all I want to find out.

The next thing I want to ask you is, you have told us this morning that, with respect to mail that was designated for a hotel or an apartment which constituted drop mail, your practice was that you were sorting throughout the night, you would merely throw that into the bin or the hopper, whatever it was, where that mail went, and that you concerned yourself chiefly with addresses rather than names? A. Yes, sir.

[659] *By the Court*:

Q. And that you didn't at that time look for watch mail? A. No, sir.

Q. You didn't do that until all that mail was segregated? A. No.

Q. And that you went through all over again a number of pieces of mail in the drop bag or in the drop hopper? A. In the drop boxes.

Q. Boxes. All right. Now, what did you do with mail that was going to regular routes? Did you look for addresses on that mail? A. No, sir.

Q. You looked for names there? A. No. I just looked for addresses, too. I just boxed up, as a rule, addresses.

Q. All right. Now, you would be going through your mail and all you would be looking for would be addresses? A. Yes.

Q. Some would go to a regular route and that would go into the box for that route? [660] A. Yes.

Q. Some would go to a drop and you would put that in the drop box? A. Yes.

Q. Now, did you then go through all of the boxes, all of the mail in all of the route boxes to find out whether there was any watch mail that you had allowed to pass through into that? A. No, sir.

Q. Well, then, is it so or is it possible then that watched mail if it was going into the regular route went out without you catching it? A. Well, if it goes into a regular route the carrier catches it because he has to box it.

Q. He has to box it? A. Yes.

Q. And you don't pay any attention to that? A. No.

Q. All right. Very well. Was it your instruction as a clerk to examine this mail as you were boxing it and pick out watched mail? A. Yes, sir.

Q. And that instruction applied to all of the mail, did it not? [661] A. Yes, sir.

Q. Not merely that that went to a drop but that which went to any one of the routes? A. Yes.

Q. Is it your story that you performed your function only with respect to drop mail and you paid no attention to mail that went into the regular routes? A. Well—

Q. Is that so? A. Not exactly. As you are boxing up mail during the night, you might box up 10,000 letters a night, and you are going pretty fast, you might miss one or two letters.

Q. Well, yes, but the point is, are you looking for it? A. Well, if I had seen it, I would hold it.

Q. Were you looking for names or merely for addresses when you put that mail into the route boxes? A. Well, when you are boxing it with great speed and you don't particularly—you just throw it, and if you happen to come across one, you hold it out.

Q. Suppose you were boxing drop mail and you [662] happened to come across one, what would you do? A. You don't exactly box the drop mail; you box up all the mail and whatever comes, comes.

Q. As you go along you have one with an address, for instance, 115 Central Park West, and that would go into the drop box, would it not? A. Yes, sir.

Q. Now, suppose you happened by chance to see one addressed in this case to Mr. Costello or Mrs. Costello: Did you just throw it in the drop? A. No.

Q. Or did you put it aside? A. I would hold it out.

Q. And how long would it be before you delivered that to the supervisor? A. Well, maybe as soon as I get up from my seat where I was boxing it.

Q. But you wouldn't hold it until the other mail went out? A. No.

The Court: All right.

By Mr. Williams:

Q. Mr. Pignataro, isn't it the practice with respect to non-drop mail as distinguished from drop [663] mail that the clerks have a double check on their sorting and the postman also looks for the watch mail, is that right? A. Yes, sir.

Q. With respect to drop mail you don't have another check on that mail, do you? A. No. They have the clerks check it.

Q. You only have the clerks check it? A. Yes.

Q. And so over at the Ansonia branch the general practice has been among the clerks to let the letter carrier pretty much worry about watch mail on their routes, isn't that so? A. We have nothing to do with the carriers. We just box up the first class mail in the front.

Q. I understand that. The fact of the matter is that the clerks over there at the Ansonia branch know that their work is going to be checked with respect to mail that is going out by carrier in so far as watches are concerned, isn't that so? A. Yes, sir.

Q. And so you don't pull that mail out at the end of your tour to see if you have missed any letters? A. No, sir.

[664] Q. Because you rely on the carriers to do that, is that right? A. Yes, sir.

Q. Now, with respect to what we have called here this morning drop mail, you do pull that mail out wherever you have a watch on a given building, is that right? A. Yes, sir.

Q. Of course, you only have to do that with respect to the buildings in which there is a person who is being watched, isn't that so? A. That is true.

Q. Now, when you are sorting your mail at night you are supposed to sort a thousand letters an hour, aren't you? A. Yes, sir.

Q. Is it the practice over there at the Ansonia branch—

The Court: Now, Mr. Williams, if you are attempting to develop some facts here you had better let the witness testify to them. A good part of this morning I have been hearing yes and no answers from the witness to questions which set up the practice for him. In fairness to you I must warn

you that [665] you are now working on that that affect credibility, and yours is not in issue here but the witness' is. So I suggest to you that you may have that in mind with your questions.

Mr. Williams: Yes, sir.
(Last question read.)

Q. Well, what is the general practice among the clerks in so far as you know from your experience there in eight years with respect to segregating mail which is being watched and which goes into the drop sacks? When is it done? A. Well, it is done in the morning most of the time; all the time.

Mr. Williams: That is all.
Mr. Christy: No further questions, your Honor.
The Court: Have you any further questions?
Mr. Williams: Mr. Shilensky suggested a question, your Honer, if I may ask it.
The Court: Yes.

By Mr. Williams:

Q. When does the letter carrier come around and remove the mail from the boxes which are non-drop mail? [666] That is a very awkward question.

The Court: Route mail.

Q. Which is the route mail? A. Well, he starts at six o'clock, when he starts, and later, and he makes periodic sweeps of the mail until they get the final bell which means they pick up the mail not any more.
Q. Does he take the mail from your – A. Case?
Q. Case—going out on routes before the drop sacks are completed? A. Yes, sir.

By the Court:

Q. Does he leave before the drop sack leaves? A. He makes the final sweep of the mail down the aisle at the final bell just before the drop sacks leave.

Q. But he doesn't leave the office, does he, before the drop sacks? A. No, sir.

The Court: Very well.

Mr. Christy: No questions, your Honor.

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[667] THOMAS M. FAY, JR., called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. What is your present address, Mr. Fay? A. 155 Leonard Street.

Q. That is in New York City? A. New York City.

Q. How long have you lived there? A. That is where—I can't hear you, Mr. Williams. I got a very bad cold.

Q. I take it you have given us your address of employment rather than your residence? A. That is right.

Q. What is your residence address? A. 7200 Ridge Boulevard, Brooklyn, New York.

Q. How long have you resided there? A. For about 16 years.

Q. Now you are employed, are you, in the office of the District Attorney of New York County? A. That is correct.

Q. What is your occupation in that office? A. Chief investigator.

Q. How long have you been so employed? [668] A. Since—as chief investigator since May of 1947.

Q. How long have you been employed in the office of the District Attorney of New York County? A. August of 1935.

Thomas M. Fay, Jr.—for Defendant—Direct

Q. Mr. Fay, did you receive or did your office receive a subpoena to produce certain records here in this hearing? A. We did.

Q. Do you have that subpoena with you, Mr. Fay? A. (Witness hands to counsel.)

Q. Now, Mr. Fay, the other day Lieutenant Shipsey produced here the transcriptions of telephone conversations that went over the home telephone of Frank Costello, 115 Central Park West; he did not have with him at the time the telephone transcriptions of conversations in which Costello had participated not from his home.

Do you have any of those with you? A. No, sir, I do not.

Q. Well, can you tell us whether there are such transcriptions in the custody of your office? A. I believe a search has been made—I have heard about it, and probably Lieutenant Shipsey might [669] be able to enlighten you on that. I don't know what they got.

Q. Well, Mr. Fay, he was here the other day and did not have those records. A. Then I am sure—

Q. He said you had them. A. No, I don't have them, but I am sure we can get them for you, Mr. Williams.

Q. Will you make an effort to get those for us? A. Yes.

Q. Have you brought here, Mr. Fay, what I shall describe as the custodial records of these transcriptions showing what people have had official access to them? A. What people?

Q. Yes, sir. A. I don't understand your question, Mr. Williams.

[670] Q. Well, I will try to rephrase it.

Have you brought records here pursuant to this subpoena showing which people, if any, have had access to the Costello transcriptions? A. Yes, sir.

Q. Officials? A. I have.

Q. Will you produce that record?

Mr. Williams: Your Honor, yesterday you asked me to give you a list of Exhibit I (handing).

The Court: Thank you.

Q. Do you have those, sir? A. I have them right here.

Mr. Williams: May that be marked for identification, your Honor, as Defendant's Exhibit K, I believe?

The Court: Are these the original records, Mr. Fay, of the office?

The Witness: That's right.

The Court: You do not have photostats?

The Witness: No, I do not.

The Court: Could photostats be made?

The Witness: Yes, sir.

The Court: Will you have them made and [671] furnish them to us because I take it there is going to be some resistance to giving up these permanent records for any considerable length of time. But you will deliver them now so they can be available for examination. You may take them when you leave and bring back copies.

That, I take it, is agreeable to you, Mr. Williams?

Mr. Williams: Yes, sir.

Mr. Christy: Your Honor, I would object to the production of these records; not any testimony from them, but the production of these records. I presume they are records kept by Mr. Fay, his own notes, and I don't think that Mr. Williams is entitled to see these. I think that Mr. Fay can testify from what is contained therein, but I don't think he is entitled to see them.

Mr. Williams: Your Honor, I certainly think that the records of Mr. Hogan's office with respect to the accessibility of the information which has

already been shown to have been there is most vital to this case and I think we are entitled to see what those records reflect with respect to whether or not persons who had a part in the development of this case or the presentation [672] of this case did in fact go to that office and see the transcriptions of the telephone conversations which are in issue.

The Court: I take it from the nature of your question and the witness' answer that this record would reflect the names of everybody that had access to those records. I would suppose there is material relevant to your case here to ascertain whether any of those who, as you describe them, worked on this case had access to those records.

I take it it is not any of your concern who else besides those did, and I think you may go ahead and develop that.

Mr. Williams: One of the problems with that, your Honor, is that Mr. Fay, of course, is in no position to know who in fact might have had a part in this case, and all of us here are in a far better position to know and I suppose that the records would show it to us, but in order to obviate what I think Mr. Christy and your Honor have in mind, if the records could be made available to me I would not introduce any portion of them in evidence except such as had a relevance to this case.

The Court: I take it that that doesn't meet [673] the difficulty at all, Mr. Williams. The difficulty is that the District Attorney quite understandably is reluctant to disclose even to such a distinguished member of the bar as yourself or any of your staff or your client matters which are not relevant to this case. I take it that he would take the same position with respect to this Court, that it is none of the Court's business in this case to find out the name of each and every person to whom he may have made these records available.

Mr. Williams: Your Honor, I will attempt to approach it in another way, and I think perhaps I can satisfy everybody's interests.

The Court: The very first thing we will do, we will take this batch of papers which Mr. Fay has produced, he says, pursuant to the subpoena and we will have them marked for identification.

Are they stapled together?

The Witness: Yes.

The Court: How many sheets are there?

The Clerk: Eight sheets.

The Witness: And one more envelope with two sheets in it.

The Court: Another envelope with two sheets—

[674] The Witness: Three sheets. Pardon me, your Honor. Three sheets.

The Court: Very well. Fasten them together.

The Court: How many sheets have you altogether now?

The Clerk: Eleven.

The Court: All right. They will be marked with whatever the next defendant's identification is.

(Defendant's Exhibit K marked for identification.)

The Court: Mr. Fay, is it the fact that these sheets constitute a listing of the various persons who have been permitted access to the transcriptions of telephone conversations intercepted over the Costello wire?

The Witness: That's correct, your Honor.

Mr. Williams: Your Honor, I would like with your permission to ask Mr. Fay if he has been ordered to resist the production of these by his own superior, Mr. Hogan, to see whether Mr. Hogan feels that these are shrouded and privileged.

The Court: That is quite an appropriate question.

Thomas M. Fay, Jr.—for Defendant—Direct

[675] *By Mr. Williams:*

Q. Have you been ordered or instructed by your superior—Mr. Hogan—to resist the production of this record, Mr. Fay? A. Specifically, no, except that in my own position as chief investigator these are original records and may refer to other persons that you are interested in. I haven't discussed it with Mr. Hogan.

Mr. Williams: Your Honor, may I ask him—

The Court: You may ask him anything.

Mr. Williams: —to ask Mr. Hogan whether he is resisting this, because the subpoena was addressed to Mr. Hogan and no resistance was forthcoming from him at the time it was served on him and I had a discussion with him about the subpoena at that time?

The Court: It may be he has no objections, and if he has none I have none, and that would be the answer to that. They are his records.

Q. Will you ascertain whether there is a resistance on the part of Mr. Hogan to the production of these records, Mr. Fay? A. I will.

Q. Will you do that during the luncheon recess of [676] this proceeding today? A. I will.

Q. Mr. Fay, do your records reflect all of the official visits to your office for the purpose of seeing transcriptions of the Costello phone calls? A. Yes, sir.

Q. And they are requests that have come to you or Mr. Hogan; is that right? A. That's correct.

Q. Do they reflect any Government lawyers having seen these transcriptions? A. Any Government lawyers?

Q. U. S. Government.

The Court: Government lawyers. You mean men from the U. S. Attorney's office?

Mr. Williams: Yes, sir. U. S. Attorney's office. I will confine it to at this time.

The Court: Very well.

A. Well, I have to qualify that answer. They reflect Government attorneys looking at the plant cards but not at the transcriptions.

Q. And who were those lawyers from the U. S. Attorney's office who looked at the plant cards? A. Assistant United States Attorney Christy and [677] Seymour.

Q. When you say Assistant United States Attorney Christy, do you mean Mr. Arthur Christy, who sits at this table? A. That's correct.

Q. And when you say Assistant United States Attorney Seymour, do you mean Mr. Whitney North Seymour, Jr.? A. I do.

Q. Do you know of your knowledge, Mr. Fay, whether Mr. Whitney North Seymour, Jr. was of counsel in this case, the Costello case; do you have that knowledge? A. No, not directly, but I assume he was.

The Court: There isn't any doubt about it. The Court now sitting will take notice of that because he was before me for some weeks.

Q. Mr. Fay, do your records show when Mr. Christy and Mr. Seymour saw these plant cards? A. Yes, sir.

Q. Would you tell us when that was, sir? A. March 4, 1954.

Q. On March 4, 1954. Mr. Fay, do your records show whether or not they were given access to the [678] transcripts as well? A. No, they do not, and I know they had no access to the transcripts.

Q. When you say the records show that they had access to the plant cards, do you mean those cards which are synopses of the transcribed phone calls? A. I mean only certain of those cards, not all of them.

Q. What do your records show on that score? A. The records show—

Q. Do you know what your records show without looking? A. Well, I can tell you how many cards they looked at without looking. I believe that was six calls in '43 and two in '46. I could verify it now, but I think I am right.

(Witness refers to documents.)

A. That's right.

The Court: By that you mean that Messrs. Christy and Seymour had access to six plant cards in 1943 and two plant cards in 1946?

The Witness: That's right.

By Mr. Williams:

Q. Were your present when they inspected the plant [679] cards? A. Yes, sir.

Q. You were present at all times? A. Yes, sir.

Q. Was anyone else present? A. Not besides us three, no, sir.

Q. Not besides the three of you.

Now, Mr. Fay, are the plant cards that you have reference to plant cards of calls that emanated from the Costello phone at 115 Central Park West? A. Now, I don't know whether they emanated but they were over that telephone.

Q. They were over that phone? A. That's right.

Q. At the time were any plant cards made available to them of conversations in which Costello was a participant wherein the phone at 115 Central Park West was not used? A. Not by me.

Q. Not by you.

What do your records show with respect to any other members of the United States Attorney's office or Department of Justice having access to these records? A. They show that no other member had access to [680] those records from those offices that you mentioned.

Q. From either the Department of Justice or the U. S. Attorney's office?

He doesn't get the nod of your head, Mr. Fay. A. That's right. I am sorry.

Q. Do you understand, Mr. Fay, that the United States Immigration and Naturalization Service is part of the United States Department of Justice? A. That's right.

Q. And is it your testimony that nobody from those services, either a lawyer or otherwise, had access to the records? My first question related only to lawyers. Now I am asking you lawyers or investigators.

The Court: Just a moment before you answer that, Mr. Fay.

Mr. Williams, there is a separate litigation involving immigration.

Mr. Williams: Yes, sir.

The Court: And it has its own problems, whatever they be, and I expect during the course of time they will come before some judge, but I don't want to borrow those problems in this tax case. I will not permit you to go into that examination here.

[681] You need not answer that question.

Mr. Williams: May I advise the Court of one thing relative to that, your Honor? I want to say to you that I expect to show that there is a tie-up between this case and the records made available to the Immigration Service.

The Court: Well, you had better go about it in another way. You are not going to do it this way, Mr. Williams. I tell you, just watch: Last December a motion was made in this case to set aside the conviction on one ground. We started to conduct hearings in June and the first ground had a second added to it. Yesterday a third ground was added to it.

Now you are beginning to lay the basis for what appears to be a fourth ground, and I anticipate that we are going to have more grounds than days of our lives.

The defendant's position in the Immigration case is separate and apart from this and we are not going to try that issue out here. We have enough problems in this one.

By Mr. Williams:

Q. Now, do your records show, Mr. Fay, the persons who had access to the transcriptions through persons [682] other than yourself or Mr. Hogan?

The Court: Do you understand that?
The Witness: I understand it.

A. The answer is no.

Q. They do not.

Do your records show whether or not agents of the Bureau of Internal Revenue had official access to these transcriptions? A. They do not.

Q. Do your records show whether these transcriptions were made available to Mr. McMahon, the chief prosecutor in this case? A. They do not.

Q. Would you tell us, Mr. Fay, which cards Mr. Christy and Mr. Seymour examined? A. On 5-27-43, on 6-1-43, on 6-21-43, 6-25-43, 7-27-43, 7-28-43, 7-9-46 and 8-2-46.

Q. Do your records show which persons were engaged in the conversations on those dates? A. It shows a resume of the conversation, not the full conversation.

Q. I am asking you, first of all, Mr. Fay— A. Which persons? I am sorry.

Q. —the parties to the conversations. [683] A. On 5/27/43, the call was from Costello to a person named Joe.

On 6/1/43, Costello called his wife in New Orleans.

(Bell rings.)

The Court: Maybe we had better take a recess. I am not concerned about the ringing of the bell, except it is a little difficult to hear the witness when that bell is ringing.

We will take a five-minute recess.

(Short recess.)

[684] Q. Mr. Fay, I understood you to say that the first call was to a party identified as Joe. Can you tell us to what number that call was made or from which it was made? A. It was made to 5742 New Brunswick.

Q. And it was made, was it, Mr. Fay, from Trafalgar 4-3034? A. 3403, isn't it, his number? I don't have it in front of me, but I remember it. I think it is 3403.

Q. Trafalgar 3403. A. I think that is it.

Q. Now, can you tell us from where the second call was made and to where? A. That is on 6/1/43, call to Magnolia 2371. That is the Roosevelt Hotel, New Orleans, Louisiana. Costello called his wife.

Q. From the same number? A. That is right.

Q. Now, with respect to the third call, sir? A. On 6/21/43 the number called was Volunteer 5-2800. Costello to Sherman.

Q. Was that Volunteer number, Mr. Fay, a New York number? [685] A. That is right.

Q. And the fourth call, sir? A. On 6/25/43 to Wickersham 2-5800, the Hotel St. Moritz, George Uffner called a Mr. Mallory.

The Court: Who called whom?

The Witness: Uffner called Mr. Mallory.

Q. And the next call, sir? A. 7/27/43, an incoming call, man to Costello.

Q. The next call? A. 7/28/43 an incoming call, Pete to Costello.

Q. The next one, sir? A. 7/9/46, Butterfield 8-0306, Frank called Dr. Richard Hoffman.

Q. Called Dr. Hoffman? A. Richard Hoffman.

Q. The next call, please? A. 8/2/46, Sally spoke to Frank.

Q. Who was that? Sally? A. S-a-l-l-y.

Q. That was an incoming call? A. Apparently so.

Q. Now, do you have those calls, the substance of those calls synopsized there as the synopsis is reflected in the plant cards, Mr. Fay? [686] A. Yes, I do.

Q. May I see that, sir? A. (Witness shows to counsel.)

Q. Does this purport to be an exact copy of each of the plant cards? A. Oh, I wouldn't say it is exact but it is pretty near right, I guess. It may be exact.

Q. Mr. Fay, did Mr. Christy or did Mr. Seymour ask to see these particular calls or were you simply showing them samples? A. What happened exactly is this:

On March 2nd I received a telephone call, in 1954, from Mr. Christy, requesting me to check our files for any information that I might have available to him for cross-examination in the case of Frank Costello. I told him that I would see what I had, and for him to call me the following day. A telephone call was made, and on March 4 both Mr. Christy and Mr. Seymour came in. In the interim I examined the cards in the Costello case myself and picked out what I thought might be useful to the Government on cross-examination. Those are the calls you have listed there. Plus a few others that I read to them and which they did not desire to take, but I [687] did the picking out myself.

Q. Sorry, plus a few others that you read to them? A. That is right.

Q. Do you have a record of what they were? A. I do.

Q. What were they? A. Well, they are in the file I am going to do some checking on, because there is other memoranda on that paper, but I have no hesitancy in showing

them or letting you see them as far as they are concerned, but they are attached to other sheets which I am going to speak to Mr. Hogan about, as you asked me to.

Q. Well, could you tell from the witness stand what other cards you showed to Mr. Christy and Mr. Seymour? A. Well, without referring to the memoranda I couldn't.

By the Court:

Q. Could you tell us the dates? A. I could give you the dates.

Q. But you showed them cards or read off— A. No, I read off the cards, your Honor.

[688] Q. You read off the cards? A. As I read off, they picked the eight that are on that sheet. 5/10/43; 5/27/43; 7/24/43; 7/20/43; 6/15/43; 6/22/43; 7/29/43; 8/16/43; 5/27/43; 6/3/43; 8/13/43; 9/7/43; 8/27/46; and 8/14/46.

By Mr. Williams:

Q. Now, did you read any cards from the 1951 or the 1950 or the 1952 intereceptions? A. No.

Q. You did not? A. No.

Q. Did you go through those to see whether you could find anything helpful for Mr. Christy? A. In the 1951 and 1952?

Q. In 1952. A. In 1952? Now I can't recollect.

Q. Well, now, other than Mr. Christy or Mr. Seymour's reading these plant cards or your reading them, the plant cards to them, did anybody else read anything to them or did they have access to anything else there? A. They did not.

Q. In the way of plant cards? [689] A. No, sir.

Q. Is this the sum and substance of those plant cards, all those that were either read or which they read? A. That is right.

Thomas M. Fay, Jr.—for Defendant—Direct

Q. Now, I want to save as much time as possible, Mr. Fay, but can you give us the names of the persons to whom Mr. Costello talked in these calls, quickly? A. I don't think I have that record here.

The Court: Which calls? Do you mean that last batch that were read?

Mr. Williams: Yes.

A. I probably could in most of them supply the names as I look at the sheet here.

Q. Are these all calls, sir, in which Frank Costello himself was a participant? A. Well, I will have to look at them as I go along.

Q. All right.

By the Court:

Q. Well, you have read us a total of 14 cards which you say you read to them? A. I didn't count them, Judge.

Q. Well, am I right about that?

[690] Mr. Christy: Yes, your Honor.

The Court: I counted 14 as I jotted them down.

Mr. Christy: That is correct.

The Witness: 5 10 43 an incoming call, Rose called Barbara.

On 5 27 43 Costello called New Orleans, a person named Dudley.

7 24 43 incoming call, Costello to Mrs. Costello.

7 20 43, incoming, Irving Sherman to Costello.

6 15 43, Costello called Castel at New Orleans.

6 22 43, incoming, Jim O'Connell called Costello.

7 29 43, Costello called Castel at New Orleans.

8 16 43, Jim called Costello, J-i-m.

7 27 43, Costello to Phil Castel in Chicago.

6 3 43, Costello called Castel in New Orleans.

8/13/43, Costello called Castel in New [691] Orleans.

9/7/43, Costello called Castel in New Orleans.

8/27/46, Professor called Costello, incoming.

By Mr. Williams:

Q. Who is that? A. Professor, P-r-o-f-e-s-s-o-r. 8/14/16, outgoing, Costello called George Wolf. That is the list.

Q. Now, Mr. Fay, have you done the same thing with respect to these calls that you did with the previous group of calls which you spoke to us about, namely synopsize the conversation? A. No, I have not.

Q. Do you have a synopsis of the conversations on the yellow pads from which you just read? A. I have a little of the conversations.

Q. Well, is it as much as appears on the plant cards less? A. I don't believe so. I don't think it is the entire conversation as appears on the plant cards.

Q. Was there some reason in your mind why you thought these cards would be helpful to Mr. Christy or Mr. Seymour? [692] A. Well, when they requested my assistance in the matter they wanted to know if he had been out of town from 1949 back, and I figured that some of these calls that were out of town might indicate that he was going or had been there and came back or something else.

Q. Well, do I understand you just picked out the calls that were made long distance? A. Most of them were. I didn't know exactly what they wanted for cross-examination, but I picked out what I thought might assist them.

[693] The Court: Mr. Williams, I am wondering, are you trying now to get the operations of this man's mind? What is relevant here and material, as far as the matters I have to decide, is what information from those intercepts came into the possession of the United States Attorney.

Now, you may proceed on that, but what this man had in his mind when somebody asked him for general information is something that I don't think we can have the time to go into.

Mr. Williams: I was trying to get the information, your Honor, but apparently it isn't here.

The Court: That is all right. As to that I have no quarrel with you pursuing your inquiry, but what this man had in mind when he went through and picked out certain cards is of no concern here.

By Mr. Williams:

Q. Mr. Fay, can you prepare for us a sheet such as you have prepared for us in the first group of calls from the notes that you have with you here this morning? A. Excuse me, Mr. Williams. You have all the cards in evidence here. I don't have them any more.

Q. I understood—

[694] The Court: You mean that these cards, the cards that you would need to get the information, are cards which were produced here by the police officer?

The Witness: Yes.

The Court: And they are now in evidence, that is, they are marked for identification, but I recall we had the problem whether I was going to go through all those cards and pick out what was relevant or whether you were.

Mr. Williams: Yes.

The Court: At least we have them here in court.

Mr. Williams: Your Honor, we have made a noble effort at this and we find that the unfortunate thing is that there are several calls on the same sheet, so it isn't a simple job of just pulling them

out; and I don't want to destroy Mr. Fay's records, of course, but we can't just pull out isolated sheets, and just as a housekeeping matter I think that we probably can't segregate—

The Court: Well, that may be. All I suggest to you is this—it is more than a suggestion: if you can't separate them, I am afraid that I can't.

Mr. Williams: Can't physically separate [695] them, your Honor, and that is why perhaps we can offer them in total form and perhaps flag them. That is the only way I can.

The Court: That is all right, but the flagging will have to be done.

By Mr. Williams:

Q. I understood, Mr. Fay, that you had here in your possession, and I am just trying to save us all some time—you had here in your possession synopses of the conversations on these yellow sheets from which you have been reading. A. I have.

The Court: Yes, but you just inquired about that and Mr. Fay has said to you that he has notes in there which referred generally to the conversation but they don't contain a complete transcript of the conversation as would appear in the card; is that right?

The Witness: That is right.

The Court: That is not true of those sheets you are holding in your hand and they comprise the results of copying of the cards of 1943 and cards of 1946; am I right?

The Witness: That is right.

Thomas M. Fay, Jr.—for Defendant—Direct

[696] *By Mr. Williams:*

Q. Is this an exact copy of the cards? A. That is an exact copy as far as the typewritten copy can be. There may be a mistake in it which I wouldn't know about.

Q. In other words, you are telling us that we must go through the cards and do this because you have not as yet? A. I don't have them.

Mr. Christy: May we have this sheet marked for identification? I don't think it is.

Mr. Williams: I was just going to. May this sheet, your Honor, which has been identified as—

The Court: Let's mark it first.

(Defendant's Exhibit L marked for identification.)

The Court: That consists of how many sheets there?

The Clerk: Two sheets, your Honor.

The Court: Two sheets produced by the witness Fay.

As I understand it, they purport, in so far as the witness is able without accurately checking with the cards, to be summaries of the conversations that were held over the Costello phone on the six dates in 1943 and the two dates in 1946 concerning which the witness has testified.

Is that correct?

The Witness: That is correct, your Honor.

Mr. Williams: Your Honor, in order to expedite this, may I ask Mr. Christy if he has synopsized these cards or made a copy of these cards?

The Court: Mr. Williams, please. I don't know where you get that. I am not going to take up the time and fill this record with your cross-examination of anybody whose name comes into your mind at a

particular moment. There are some of us who have conducted litigation in our lives.

Mr. Christy is available to you and you can talk to him about it some other time, but we don't have to go through this performance in a public courtroom. Please, you can ask Mr. Christy what records he has, and up to now, as far as I can see, he has disclosed whatever he has. He hasn't necessarily made them available to you, but, if he has them, he says they are here.

All right. Now let's get along.

[698] *By Mr. Williams:*

Q. Now, Mr. Fay, are the transcriptions of the conversations in which Mr. Costello was a participant which did not go out or come in over Trafalgar 4-3403 or Trafalgar 4-2325 presently in the physical possession of Mr. Shipsey in so far as you know? A. As far as I know, they are.

Mr. Williams: That is all.

The Court: Mr. Reporter, will you read that last question.

(Question read.)

Cross-examination by Mr. Christy:

Q. Mr. Fay, do you have a record which indicates the actual dates which Costello's telephone was tapped? A. I do.

Q. Would you read those dates to us, please?

The Court: Do you mean whatever mechanical arrangement was necessary to put a tap on?

Mr. Christy: That is right, the dates on which Costello's phone was actually tapped. We had some

testimony from Lieutenant Shipsey, but your Honor will recall he was not certain about a few of the dates.

The Court: All right.

[699] A. From May 7, 1943, to November 5, 1943—

The Witness: I can't hear too good. Can they hear me, Judge?

The Court: I think so.

Mr. Christy: If I can't, I will let you know, Mr. Fay.

A. From June 11, 1946, to September 10, 1946, and from September 20, 1950, to April 15, 1952.

The Court: What was that last one, from September 20?

The Witness: September 20, 1950, to April 15, 1952.

By Mr. Christy:

Q. That is, on April 15, 1952, the tap was withdrawn; is that correct? A. Correct.

Q. Now, Mr. Fay, these dates which you have read to us are the only dates on which the District Attorney's office has ever had a wiretap on Frank Costello's phone; is that correct? A. That's right.

Q. Mr. Fay, it was your practice, was it not, to keep a memorandum of those persons who might come to see you with regard to the Costello case; is that right? [700] A. That's correct.

Q. And I will ask you, Mr. Fay, if your records reveal that any of the following named persons ever came to see you in connection with the Costello case or, more particularly, the wiretaps: Mr. John Robert Murphy? A. No, sir.

Thomas M. Fay, Jr.—for Defendant—Cross

Q. Mr. Wilfred Leath? A. No, sir.
Q. Mr. John McIntyre? A. No, sir.
Q. Mr. Peter Geissler? A. No, sir.
Q. Mr. Ed Matheny? A. No, sir.
Q. Mr. Albert Sohn? A. No, sir.
Q. Mr. Whitman Cordes? A. No, sir.
Q. Mr. Allen Stockvis? A. No, sir.
Q. Mr. Edward Dolan?

The Court: What was that last name?
Mr. Christy: S-t-o-c-k-v-i-s.

[701] Q. Mr. William Mellin? A. No, sir.
Q. Or Mr. James Ronayne? A. No, sir.
Q. And your files don't reflect that any Treasury agent or Internal Revenue agent came to see you about the Costello case and, more particularly, the wiretaps other than the names of the persons that I have read to you; is that correct? A. That's correct.

The Court: Read that question to me, please.
(Question read.)

By Mr. Christy:

Q. Mr. Fay, with regard to the plant cards that you referred to, and I mean those other than the ones for which you had a memorandum, that is, the 14 that you referred to later, I believe you stated that you read them to Mr. Seymour and myself when we came over. A. That's correct.
Q. Is it not your recollection that you had those cards with you and you read to us the names of the persons called without reading the entire plant card? A. I believe that's so, that's right.

Mr. Christy: No further questions, your [702] Honor.

Thomas M. Fay, Jr.—for Defendant—Redirect

Redirect examination by Mr. Williams:

Q. Mr. Fay, you testified, as I understand it, under cross-examination that the wiretap on Mr. Costello's line was terminated on April 15, 1952. A. That's right.

Q. I want to hand you an exhibit which has been marked Defendant's No. D for identification and ask you if this is an order procured by your office on March 7, 1952, to run for six months on Mr. Costello's wire? A. That's correct.

Q. Does this not show, Mr. Fay, that it was terminated 11/6/52. A. I don't know what you mean, terminated on 11/6/52. You mean the order ran that length of time?

Q. That the tap was terminated on 11/6/52. A. I don't know whose record this is, but I have my own record here which shows that it was terminated on April 15, 1952. I don't know anything about this.

Q. When was the tap put on—

The Court: Pardon me. What is the exhibit you are referring to?

Mr. Williams: Exhibit D, your Honor, for identification.

[703] Q. When was the tap put on which was terminated on April 15, 1952? A. When was it put on?

Q. Yes. A. It was put on on September 20, 1950.

Q. 1950, and it was there continuously; is that right? A. As far as I know. We got renewal court orders on it.

Q. Does your record show that you terminated the tap a month after you got a renewal on it in 1952? A. That's right.

Q. A month later? A. That's right. April 15th. The renewal was on—when? March?

Q. March 7. A. March 7; so it is a little over a month.

Q. March 7, 1952. A. To April 15.

Q. Are you familiar with these cancellation orders of the phone company? A. No, I have nothing to do with them.

Thomas M. Fay, Jr.—for Defendant—Redirect

Q. Mr. Fay, during your experience in Mr. Hogan's office do you recall instances when telephone taps were [704] put on telephone lines other than Costello's home phone lines for the purpose of securing his conversations? A. I didn't hear that full question. You were walking back and my hearing is bad.

Q. I am sorry. In your experience in Mr. Hogan's office do yo urecall instances where telephone interceptions were made on telephones other than Costello's home phone for the purpose of securing his conversations? A. I do not.

Q. You do not.

Would your records show whether that was done? A. Would my records show if that was done?

Q. Your office records. A. I have no recollection of it. I don't know what you mean, Mr. Williams.

Q. Do you not understand my last question, Mr. Fay? A. No, I don't.

Q. Well, my last question was, would the records in the office of the New York County District Attorney show whether this was done or not? A. I couldn't answer that question whether it would or would not. I wouldn't know. That's all I [705] can tell you.

Q. I understand you wouldn't know and you can't tell s whether your records would show that or not? A. No, I cannot, because I wouldn't have certain records that might reflect that and might not reflect it, too. I don't know.

Q. Do you have access to the records which would reflect it if it were the case? A. I could get access to them.

Q. Would you ascertain for us, sir, whether or not these records do reflect whether or not telephone interceptions were made on telephone lines other than Mr. Costello's home phones for the purpose of securing his conversations? A. I will do that.

Mr. Williams: That is all I have, your Honor.

The Court: All right. We will adjourn now until 2:15. By the way, gentlemen, I have a hearing in another matter, on another motion for a new trial on the ground of newly discovered evidence, incidentally. I am going to have a hearing at 4 o'clock this afternoon. So we will adjourn at 4 until tomorrow morning.

(Recess taken until 2:15 p. m.)

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[706] Afternoon Session—2:15 p. m.

(The following proceedings took place in the robing room:)

Mr. Christy: Your Honor, during the morning session when Mr. Fay was on the stand Mr. Williams propounded a question to him along the lines of whether they had ever shown any of the wiretaps to anybody in the Immigration Service. The Government didn't object to the question. Your Honor felt that this should not be asked. Let me say that we would have no objection to the question being answered as long as your Honor doesn't have any strong objection to it. We have nothing—

The Court: Well, I have no objection to it but I am not going to get into the Immigration case from this case. That is the only reason I have.

Mr. Williams: I think it should be stated before I ask the question that the reason I asked it was because I propose to show that the agents of the Revenue Department had gone to other Government agencies to get other information in building the tax case. I don't think I made that clear by my question, but I wasn't trying to retry the other case.

[707] The Court: Well, if that is all you want to show, if it has a rational connection with this case, the issues on this motion, then I have no objection.

Mr. Williams: I am not trying to get into Immigration case at all.

The Court: Well, if that is all you want to show, go ahead and do it. I was protecting the Court more than anything else because one case at a time is all that we can try.

Mr. Williams: As far as our proof is concerned it is not following a consistent strain, but these subpoenas have gotten mixed up in the Post Office Department—

The Court: Well, I appreciate that. I know what you are up against. You have to take whoever is here and put him on the stand.

[708] (The following proceedings took place in open court:)

The Court: Get the witness—Fay.

THOMAS N. FAY resumed.

The Court: Mr. Williams, you have explained to me the purpose that you had in asking that question as to whether any officials of the Immigration Department had looked at these records, and on your assurance that you are not going to attempt to try out the issues in the Immigration case here and for the limited purpose that you represent to me, you may now ask that question.

Mr. Williams: Your Honor, maybe this is all simplified by the fact that Mr. Fay has just advised me that Mr. Hogan has no objection to that custodial record going into evidence.

The Court: Very well.

The Witness: Not the original, but a photostat.

Thomas M. Fay, Jr.—for Defendant—Redirect

Redirect examination continued by Mr. Williams:

Q. Do you have that with you now, Mr. Fay? A. Yes, I do.

Mr. Williams: I don't recall whether that has been marked or not, your Honor.

The Witness: It has, for identification.

[709] The Court: You call it a custodial record. This is a record that shows who came and had access to these telephone interception records and the dates.

Mr. Williams: Yes, your Honor.

The Witness: As far as Costello is concerned.

The Court: Yes.

The Witness: That is right.

Mr. Christy: I see among the papers that Mr. Fay has handed to Mr. Williams what appear to be some records taken from the plant cards. Now, I presume that is information from the plant cards of the 14 that Mr. Fay testified about this morning.

The Witness: That's right.

Mr. Christy: We would object to Mr. Williams being shown that. I think that Mr. Fay testified this morning that all that was read to any employee of the Government was the name of the persons that was calling Costello or the person that Costello called without the rest of the plant card being read.

The Court: Well?

Mr. Christy: So I don't see that it has any relevance here. There has been no showing that anybody from the Government has seen it.

The Court: Well, if that is the record, isn't [710] that sufficient? That is the testimony, that regardless of what the card discloses that was not disclosed you and Mr. Seymour; that all that was disclosed to you and Mr. Seymour were the

names of the persons who made the calls and when you heard that you said, "We are not interested."

Mr. Christy: That is right.

The Court: And you did not get any more. It is all right.

Mr. Williams: This has been marked K.

By Mr. Williams:

Q. You had with you this morning, Mr. Fay, a series of yellow sheets, as I recall it, which purported to show who had seen the Costello wiretap transcriptions. A. No. Whatever I had this morning is in those papers there, Mr. Williams.

Q. I understood you this morning, Mr. Fay, to say that you had a record of all the people who had seen the Costello transcripts or plant cards. Am I wrong about that? A. I don't understand what you mean by a record. This is the record of anybody that came in inquiring about them and eventually did see them. This is the entire record.

[711] The Court: My note, Mr. Williams—and this is only for your guidance—my note isn't the official record, but I was careful at the time to ask some questions about it and my note is this: that Defendant's Exhibit K for identification, which is what you now hold in your hand, consists of 11 sheets; that they were produced by Mr. Fay and that they purport to list the names of all those persons who had access to the transcriptions of conversations which came over Costello's wire, that is, all officials who had access.

Mr. Williams: Yes.

The Witness: That's right.

The Court: Those are the papers you are talking about?

Mr. Williams: Yes, but I don't find the list of persons here who did have access. That is my problem, your Honor.

The Witness: They are all on separate memoranda. This is the first one.

By Mr. Williams:

Q. This is the first one? A. That's right. These are the memoranda of the Kefauver Committee.

[712] Q. I understand. A. That is the Senate committee.

Mr. Christy: Would you keep your voice up just a bit, Mr. Fay? I can't hear you.

The Witness: All right.

Q. This morning I asked you, Mr. Fay, what United States Attorneys had access to the records that we are inquiring about here. Did Mr. Robert Martin, Assistant United States Attorney from this Southern District office, also have access to the records? A. You are talking now about the taps?

Q. The taps? A. He did not.

Q. What is this annotation here which says that on December 28, 1951, eight telephone charts complete were delivered to Mr. Robert Martin, Assistant United States Attorney, Southern District New York, in Room 320 of the United States Court House, Foley Square? A. Those were toll calls charged by the telephone company to Costello's telephone and have nothing to do with wiretaps.

[713] Q. I see. Now do your records show any Government official from the Immigration Department having access to these records? A. They do not.

Q. Do you have a recollection, Mr. Fay, that Mr. Hogan did make his transcriptions available to the Immigration Service? A. I do not.

Q. You do not? A. No, sir.

Q. Do your records show any other governmental agency having access to these taps, Federal governmental agency? A. They do.

Q. Which is that, sir? A. The Kefauver Committe, Senate Committee.

Q. When did they get access to them? A. I believe in 1951. On March 13, 1951.

Q. Who were the persons who took them? A. Mr. James Walsh, associate counsel to the committee, Senate Committee, and also Mr. Shivetts, another associate counsel of the Kefauver Senate Committee.

Q. And they were delivered in March of 1951? [714] A. That is right.

Q. Now, do you remember the occasions when these gentlemen took these taps? A. Yes, I do.

Q. Do you recall whether any of the men who took these taps on behalf of the Kefauver Committee were Internal Revenue agents on loan to the committee? A. No. They were both associate counsel, the two names I mentioned.

Q. Both lawyers, were they? A. Yes.

Q. I am pointing now, Mr. Fay, to I believe the seventh sheet of this exhibit. Is this a contemporaneous memorandum of Mr. Christy's visit? A. A telephone call on March 2, 1954.

The Court: When was the trial held?

Mr. Christy: The trial began on April 5, 1954, as I recall, your Honor.

Q. Now your memorandum indicates that you allowed Mr. Seymour and Mr. Christy to copy the information on these sheets. Which information did they copy, sir? A. The ones that are check-marked.

Q. So it wasn't altogether accurate this morning when you said that you simply advised Mr. Christy as [715] to the names of the person who was called? A. Oh, yes, it was.

Q. It was? A. Yes. This memorandum was made up after they left the office.

Q. But as I understand this and you correct me if I am wrong, Mr. Fay, this memorandum says, as I read it, that on March 4, 1954, Assistant United States Attorneys Seymour and Christy appeared in the writer's office and after checking with Mr. Sarafite, the writer allowed them to copy information on the attached sheets which were indicated by check-marks, taken from plant cards kept of the Costello wiretap? A. That is right. I made a list of all the cards I read to them, and then I check-marked the ones that they took from that list. I made that list after they left. I have the cards in front of me.

Q. Well, then, do I understand you correctly that they copied the plant cards from some of the second series of calls? A. No, they didn't. Only the ones we check-marked. They were the eight cards you have an [716] exact copy of.

Q. Now, did you bring here this afternoon, Mr. Fay, the records if any of taps of Costello conversations not over the two home phone numbers? A. No, but I requested Lieutenant Shipsey to appear with whatever records he found, and he is out in the witness room now.

Mr. Williams: May we offer this, your Honor?

The Court: All right.

Mr. Williams: As K.

At the same time, your Honor, I might offer Exhibit L which was marked this morning for identification.

[717] Mr. Christy: No objection to K, your Honor.

(Defendant's Exhiibt K for identification received in evidence.)

Mr. Christy: No objection to L.

(Defendant's Exhibit L for identification received in evidence.)

By Mr. Williams:

Q. Mr Fay, these records don't purport to show those instances where one of the police officers assigned to the police staff in the United States Attorney's office made records available to others, do they?

Mr. Christy: I object to the question.

The Court: Police officers in the United States Attorney's office?

Mr. Williams: I am sorry. In Mr. Hogan's office.

The Court: You had better reframe your question.

Q. You have certain members of the Police Department assigned to the investigative office or the investigative staff of the New York County District Attorney's office, do you not? [718] A. No, we do not, not to the investigative staff.

Q. Do you have police officers there? A. We do.

Q. What is their role in the office? A. They are known as the District Attorney's office squad, and they consist completely and fully of New York City police detectives.

Q. They are the men who make up these records in the first instance, aren't they, and when I say "these records" I mean the records of the transcriptions and the plant cards? A. That's correct.

Q. And they have access to these records, do they not? A. The men that sit on the plants you are referring to?

Q. Yes. A. Yes, of course.

Q. And your Exhibit K, which has just been offered in evidence, does not purport to show to whom those police officers made these records accessible?

Mr. Christy: Objection, your Honor.

The Court: Well, I think you had better [719] find out what the practice is. You see, the assumption in your question is what causes so much difficulty all the time, Mr. Williams. You are just assuming in your question that it is a practice of these police officers to make them available to others.

Mr. Williams: There is testimony to that effect. I am not gratuitously assuming it. The testimony of Graefnecker was he did in fact make these records available to other agencies, governmental in nature.

The Court: Well, if you say that is what he testified to. My recollection is not to that effect. My recollection is that Graefnecker said that when people came in to ask him about information that he thought he might have, he would tell them whatever he had. However, whatever the record shows it shows, and if he made the cards available to them, that is something else again.

Mr. Williams: There is, your Honor, I respectfully say to you testimony to that effect, that he did turn over the transcriptions.

The Court: I will take your statement. I do not recall that.

[720] *By Mr. Williams:*

Q. Did you hear my last question, Mr. Fay? A. No, I didn't.

Q. I said these records, and I refer to Defendant's Exhibit K which has just been offered, don't purport to show to whom the police officers who worked on these taps made the transcriptions or plant cards available, do they? A. To whom they made them available, you mean?

Q. Yes. A. No.

Mr. Williams: That is all I have.

The Court: You are going to have Exhibit K photostated and return the photostats?

The Witness: Right.

The Court: Mr. Williams, would you have one of your associates refer me to the page where Captain Graefnecker testified as you represent?

Mr. Williams: I think I can, your Honor. May I have just a moment? Maybe I can refresh your Honor's recollection by recalling that Mr. Mellin described in detail what these records looked like and said that Mr. Graefnecker had made them available to him.

[721] The Court: Never mind Mr. Mellin now. I have difficulty enough following one witness at a time. Just point out what Graefnecker said.

Mr. Williams: All right.

Your Honor, I turn immediately to page 179 and direct your attention to about the second third of the page and the question was:

"And when you say you cooperated, you gave them access, if they made a formal request or if an authorized officer from one of these agencies made a request, you gave them access to your interceptions? A. I did.

"Q. Did you have such a policy of cooperation with the Bureau of Internal Revenue? A. I did.

"Q. And over how long a period of time did that exist? A. Oh, from about 1933, 1934 up until the time I retired.

"Q. Do you recall with whom you had contact mostly with the Bureau? A. Mr. McQuillan, Mr. Keys, Mr. Mellin, Mr. Cordes, and there were other agents whose [722] names I do not recall."

The Court: Yes, but then on page 182 he is asked:

"Do you recall in the Costello case—and I have reference to the Costello tax case under investigation by the Bureau of Internal Revenue—whether information was sought from you? A. Yes, it was.

"Q. And that was in what years, as you recall? A. I recall in the 1930s giving them information, whatever information I had available at that time, and then up to the time I retired.

• • •

"Q. The agents would come over and Mr. McQuillan would call you and ask you to give his agent information? A. Yes, I would make an appointment and one of his agents would come over.

"Q. And he would be given access to his interceptions? A. Yes."

All right, that is the answer I was looking for. Thank you.

Mr. Williams: That is all I have.

[722a] The Court: Any further questions?

Mr. Christy: I have no further questions.

The Court: Very well, you may go.

(Witness excused.)

Mr. Williams: Mr. Shipsey, please.

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[723] WILLARD SHIPSEY, recalled as a witness, having been previously duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. You have already been sworn, Lieutenant Shipsey, in this case? A. I have.

Q. Lieutenant Shipsey, have you produced here records of transcriptions of telephone conversations in which Frank Costello was a party, which interceptions were made over phones at 115 Central Park West? A. I have.

The Court: Speak up, Lieutenant, please.
The Witness: I have, your Honor.

Q. Would you tell us, Lieutenant, how you found these in your files? Is there an index system by which you can find these? A. There is. The plant cards are examined. They are alphabetical and from the plant cards you can refer back to the conversations, that is, the write-ups of the conversations and pick them out.

Q. Well, did you have to go through all the plant cards in your office in order to come up with [724] these? A. We had to do that.

Q. You mean all the plant cards of every intercepted phone call that the District Attorney's office had made in the last let us say decade in order to come up with these? A. Yes, sir.

Q. Did you in fact do that? A. Yes, sir.

Q. And what did you come up with? A. (Witness referring to papers) Approximately 21 calls on one telephone line, two calls on another line, and three calls on another line.

Q. Would you state for the record which telephones lines they were? A. Circle 6-7523.

The Court: Is this the one in which the 21 calls were intercepted?
The Witness: Approximately 21, your Honor.
The Court: What is the number?
The Witness: Circle 6-7523.

Q. Do your records indicate the location of that telephone, Lieutenant Shipsey? A. Yes, sir.

[725] Q. Where? A. Alfred—Al Toplitz, address, 30 West 54th Street. Two conversations intercepted on Bryant 9-0209.

Willard Shipsey—for Defendant—Recalled—Direct

The Court: Bryant 9?

The Witness: 0209, 10, 11; Bryant 9-1565 and 66.

Q. Would you tell us, Lieutenant Shipsey, what the address of Bryant 9-0209 is, sir? A. The address I believe is 168 West 64th Street, midtown ticket agency.

Q. It is a ticket agency? A. Yes, sir.

Q. Do you know the name of that, sir? A. Midtown Ticket Agency.

Q. That is the name of it? A. Yes.

Q. How about the last phone number which you gave us which I understand to be Bryant 9-1566? A. All the numbers that I gave are listed in the name of that ticket agency.

The Court: That is all those Bryant numbers?

The Witness: Yes, sir.

The Court: There is another one you said [726] you had calls intercepted from.

The Witness: Medallion 3-9160.

The Court: What is that?

The Witness: 9160.

The Court: How many calls were there on that one?

The Witness: Three calls.

Q. To what address is that telephone assigned? A. 106 West 46th Street.

Q. What is that, sir? A. The Villanova Restaurant.

Q. Do I understand, Lieutenant Shipsey, from your testimony, do I understand correctly that there were actual taps on these lines that you indicated for us? A. Yes.

Q. In what year was the tap on the Toplitz line? A. 1951.

And on the Midtown Ticket Agency? A. 1951.

Q .And on the Villanova Restaurant? A. 1939.

Q. Now, this morning I asked Mr. Fay a question and he referred us to you on it, the question being [727] this:

Do you have any records of interceptions or of taps that were put on phones for the purpose of intercepting Costello calls? A. No, sir.

Q. You don't? You don't break it down that way in your records, is that correct? A. That is right.

Q. All your records show is where the tap was put on? A. That is right.

Q. And not the purpose for which it was put on? A. That is right.

Q. You have plant cards on those, Lieutenant? A. No.

Q. No plant cards? A. No.

Q. Well, are there none or is it that you just don't have them with you? A. I couldn't say, Mr. Williams. I believe there are plant cards.

Q. Well, I had understood, Lieutenant, perhaps erroneously that there were plant cards on all the calls that were intercepted, is that right? [728] A. Yes. I don't have the plant cards with me.

Q. The way you found these transcriptions was that you searched the plant cards, isn't that so? A. That is right, sir.

Q. So that— A. When you say I—

Q. Well, whoever found them? A. Yes, sir.

Q. The plant cards were searched? A. That is right.

Q. So there must be plant cards on them, must there not? A. Yes.

Mr. Williams: Without requiring the Lieutenant to come back here I would like to ask him, your Honor, to give them to us and I would like to offer them in evidence at the appropriate time.

Q. Would you produce those, Lieutenant? A. Yes.

Mr. Williams: May we have these marked Defendant's I believe M?

The Court: What does M consist of?

Mr. Williams: M consists of transcriptions [729] of Costello phone conversations made, your Honor, over a telephone not at his residence.

The Court: Well, that is the various numbers the Lieutenant has just testified to.

Mr. Williams: Yes.

(Marked Defendant's Exhibit M for identification.)

Mr. Williams: I think instead of making each number a separate exhibit, your Honor, I think it might be easier to put them all in one exhibit if there is no objection.

The Court: Why couldn't they be left in the folder just as they are?

Mr. Williams: All right.

(Marked Defendant's Exhibits M-1, M-2 and M-3 for identification.)

The Court: I would identify each folder and the number of pieces of paper in it; and then there will be no question later on as to whether the exhibit is intact.

Mr. Williams: Your Honor, Defendant's Exhibit M-1 consists of 21 transcriptions made of telephone calls from Circle 6-7523 which has been identified as the telephone of Mrs. Alfred Toplitz.

[730] Defendant's Exhibit M-2 consists of two phone calls made over a telephone identified as Bryant 9-0209 and Bryant 9-0210 and Bryant 9-0211, assigned to the Midtown Ticket Agency.

And finally, Defendant's Exhibit M-3 consists of three phone calls made from the number Medallion 3-9160, assigned to the Villanova Restaurant.

Mr. Christy: Is there an offer made of these at this time?

The Court: Yes.

Mr. Christy: I thought Mr. Williams was going to offer the plant cards.

Mr. Williams: Well, I am waiting for the plant cards but I don't have them here.

The Court: You are offering these in evidence?

Mr. Williams: Yes, sir.

By Mr. Williams:

Q. Did you make a search—

The Court: Well, wait a minute now. You had better let him have a look at this exhibit because presumably he is interested in your question. Would it be convenient for you to withhold your examination [731] of them until the recess?

Mr. Christy: Yes, your Honor.

The Court: Then go ahead with your question.

By Mr. Williams:

Q. Did you likewise make a search, Lieutenant Shipsey, for telephone conversations of Mrs. Costello over phones other than her two resident numbers? A. Yes.

Q. And what did you find? A. It would be in those folders.

Q. In other words, they are the same conversations of both, Mr. and Mrs.? A. It was checked under Barbara Costello, Loretta Costello and Frank Costello, and also the two listings at 115 Central Park West.

Mr. Williams: Your Honor, I suppose in the interest of orderliness it would be better for me to offer these transcriptions and plant cards when all the others are offered after they had been segregated for your Honor's convenience into those which have

definitely been tied into this record and I make that suggestion at this time and will withdraw the offer until I offer all of the transcriptions and plant cards at once.

[732] The Court: Well, now, wait a minute. You just offered that batch of exhibits.

Mr. Williams: I was just thinking of the Court's convenience. I will do—

The Court: Well, it isn't a question of my convenience so much, but I am not going to go back now and check what exhibits you offered. You offered exhibits in evidence and they were received, sometimes without objection and sometimes over objection. Whatever you are offering, you offer it when you wish, but whatever has been offered and has been received is in. That is the end of that. From now on if you want to adopt a different practice that is all right. It is up to yourself.

Mr. Williams: Well, I was trying to simply expedite matters and let Mr. Christy look at these if he wished after court so that we could move on, and I will withdraw the offer and offer all these records together.

The Court: Well, any time you say offer all these records and point your finger to that formidable pile of cards you frighten me.

Mr. Williams: I understand what you have in mind, your Honor, and we propose to comply with [733] your Honor's ruling completely in the matter.

The Court: All right. We will leave these M for identification.

Cross-examination by Mr. Christy:

Q. Lieutenant, you are attached to the District Attorney's squad? A. Yes, sir.

Q. And how long have you been so attached? A. Since 1939 with the exception of two years.

Q. 1950, 1951 and 1952? A. 1951, 1952 and a little part of 1953.

Q. And during the time you have been in the District Attorney's office squad you have never shown any of the transcriptions of Costello's telephone calls to any governmental agent, have you? A. No, sir.

Q. And that would include anybody in the United State's Attorney's office? A. With the exception of agents Mischel and Ayers who were there when the examination was made by Mr. Fuller and Mr. Wadden.

Q. That was within the past month or so? A. That is right.

Q. But other than those you have never shown [734] these transcriptions of Costello to any governmental agency? A. No.

Mr. Christy: No further questions.

Redirect examination by Mr. Williams:

Q. Lieutenant, these copies were kept in Graefnecker's office, were they not, when he was there? A. Yes, sir.

Q. They were in his custody? A. Yes.

Q. During his tenure in office, is that correct? A. Yes, sir.

Q. And the copies of these transcriptions would go to an Assistant District Attorney? A. The original would go to the assistant.

Q. And a copy would be kept by Captain Graefnecker, is that true? A. That is true.

Q. And that would be the sum total of the existing transcriptions? A. Yes, sir.

Mr. Williams: That is all.

Mr. Christy: No further questions.

Peter F. Geissler—for Defendant—Recalled—Direct

Mr. Williams: We can resume now, if the Court please, with Mr. Geissler.

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[735] Peter F. Geissler, resumed.

Direct examination by Mr. Williams (continued):

Q. Mr. Geissler, yesterday at the conclusion of your testimony there had been a reference to four cards, two of which came from Mr. Christy and two of which had come from your pocket; do you recall that? A. Yes, sir.

Q. Is my recollection correct that two of these cards concerned leads which had been received from a mail watch? A. Yes, sir, I believe two of them were from a mail watch.

The Court: Mr. Geissler, will you please speak up. I am having difficulty and I am sure Mr. Williams must.

A. Yes, it is my recollection two of them came from the mail watch.

Q. Is my recollection correct that two of them referred to telephone calls? A. Yes, sir.

Q. And I understood you to say yesterday in response to a question from his Honor that the telephone calls had emanated from a hotel. A. Yes, sir.

[736] Q. Which hotel had they emanated from? A. The Jack Tar Hotel.

Q. The Jack Tar Hotel? A. Yes, sir.

Q. And where is that located? A. Hot Springs, Arkansas.

Q. And had you gotten your information on these phone calls from the hotel? A. Yes, sir.

Q. In what form did you get your information? A. I requested the hotel to supply a list of the telephone calls

made by Mr. Costello during his residence at that hotel, and they supplied the information.

Q. When did you ask them to supply this information? A. I believe it was during 1951 and 1952.

Q. Do you recall with any more specificness the time at which you asked this? A. The file would indicate when I received the reply from the agent in Hot Springs who contacted the hotel and supplied me with the information.

Q. Does the card indicate with any more— A. Yes, the card, I believe, indicates—

Q. —specificness when you asked for this? [737] A. Yes.

Mr. Williams: May he look at the card, your Honor?

The Court: Yes, the cards are here. We marked them.

(Cards handed to witness.)

The Witness: They are sealed, your Honor.

The Court: Open it. They were only sealed to keep me and others from looking at them.

The Witness: Can I give him the information?

The Court: Yes.

A. One of the calls from the Jack Tar Hotel at Hot Springs was dated October 28, 1948.

Q. That is not my question, Mr. Geissler. My question is when did you get this information from the Jack Tar Hotel? A. I got this information during 1952.

Q. 1952? A. 1952, yes, sir.

Q. And what was it that had sent you to the Jack Tar Hotel in search of this information?

Mr. Christy: I object to that question, your Honor. This is an inquiry into whether or not [738] the Government used wiretaps. It seems to me he can put the question to the witness as to

whether he got it from wiretaps and not inquire as to how he happened to go to the Jack Tar Hotel.

The Court: Sustained.

By Mr. Williams:

Q. How did you happen to go to the Jack Tar Hotel?

Mr. Williams: Is that how you suggested I ask it?

The Court: That is the ground for the objection.

Q. Did you learn of the Jack Tar Hotel through a mail cover? A. No, sir.

Q. Did you learn of it through a telephone call? A. No, sir.

Q. Now, Mr. Geissler, yesterday or the day before when you were on the stand you said that you had kept a number of cards during the course of your investigation and these cards reflected information that you had received from the mail cover, some of them reflected telephone numbers which had been called by Mr. Costello, some of them reflected telephone numbers which had been called by Mr. Costello, some of them reflected telephone numbers which you had [739] picked up from the file which you had inherited when you went on the case; is that right? A. Yes, sir.

Q. Do I understand that of all those cards only two of them were still in the file when you saw it ten days ago, I believe you said, before this hearing started? A. I was under the impression that there were more cards. When I examined the file, there were two in the file of Mr. Christy's office and I went to the office file that was maintained in the Intelligence Division and I uncovered two additional cards which were attached to the files there.

Q. The first day that you testified here I understood you to say that you had found that a number of your cards were missing, but that there were still—I think you used

the number 10, about 10. A. I checked that, Mr. Williams, and these are the only cards that I found. There are four.

Q. Ten days ago when you checked these files were there as many as 10 of these cards? A. There were not. These cards were with cards from the Department of Investigation. They were mingled in with cards from the Department of Investigation, and [740] scanning through those cards I had the impression there were about 10 cards. There were slips of white paper in there also.

However, in going through Mr. Cristy's files before I testified, I uncovered these two cards that I had actually prepared. I then went to the office of the Intelligence Division to see if there were additional cards and I uncovered these two cards.

Q. Do I understand you correctly, Mr. Geissler, that 10 days ago when you went through the cards both the Commissioner of Investigation's cards and your cards were intermingled and at that time there were about 10 cards in total?

Mr. Christy: I think he said 5 or 10. That is my recollection of his testimony.

The Court: What he said the record will show.

Mr. Williams: The record at page 423 indicates 10, your Honor.

The Court: Does it also indicate five?

Mr. Williams: I don't think so, but I don't want to make this statement to you without looking.

The Court: What page?

Mr. Williams: At page 423:

[741] "Q. How many have you seen of those that you have already described, both mail cover cards and telephone cards? A. Oh, approximately ten.

"Q. You have seen ten, is that right? A. Yes."

The Court: That settles that.

The Witness: Mr. Williams, I would like to explain. In with these cards there were also white sheets that were similar to these cards, and when I went through Mr. Christy's files, these white sheets were in with the Department of Investigation's cards. However, when I pulled them out I found that these were the only two that I had prepared that were in there. The other ones were not in my handwriting and I did not prepare them.

Mr. Williams: I understand.

The Witness: Altogether there were approximately 10 cards.

By Mr. Williams:

Q. Then my question was—and I assume your answer is yes—that altogether, counting those cards and the Commissioner of Investigation's, there were about 10: is that right?

[742] Mr. Christy: That is not what he said, your Honor.

Mr. Williams: That is what I am trying to find out.

Mr. Christy: He said there were slips of paper in there which he mistook for cards.

Mr. Williams: I am trying to find out how many cards there were of yours and the Commissioner of Investigation's at that time.

The Court: What time?

Mr. Williams: At the time he looked at them 10 days ago, your Honor.

The Court: Very well.

A. There were approximately 10 cards and slips in the file. On further examination I uncovered the fact that

two of the cards had been prepared by me and the balance had not been prepared by me.

Q. They were Commissioner of Investigation's files? A. I do not know what they were, Mr. Williams. They were in the files with the Commissioner of Investigation's records.

Q. And the Commissioner of Investigation's records were cards just like that; is that right? [743] A. They were comparable to this, yes, sir.

Q. And am I right that the total of cards as you saw them at that time was about 10?

> The Court: He just said twice, Mr. Williams, that the total of cards and white sheets was about 10. If there is anything clear in the record as of now it is that. You may pursue it further if you wish.

Q. Mr. Geissler, I understood you to say when you were on examination Monday that it was your impression prior to 10 days ago that among the Commissioner of Investigation's cards were local to local calls, but that 10 days ago, after loking at the cards in Mr. Christy's file and in your file, you changed your impression; am I right about that? A. Yes, sir.

Q. Isn't it the fact, Mr. Geissler, that three years ago there were many, many more cards from the Commissioner of Investigation's files than now appear or than appeared 10 days ago in either your files or Mr. Christy's files?

> Mr. Christy: Your Honor, I object to that question.
>
> The Court: Overruled.

[744] A. I can't tell you if there were more records three years ago in the Commissioner of Investigation's files than appeared in Mr. Christy's office. However, at this time I

was checking many toll charges in the office of the Department of Investigations covering various taxpayers. Some of the taxpayers had out-of-town numbers and local calls would be reflected on the cards. Other taxpayers had local calls and out-of-town numbers or toll charges would be reflected on the cards.

When I first was contacted in this matter, I had the impression that there were local calls on the cards, but subsequently, upon examination of Mr. Costello's cards and other cards, I found out that it was restricted to toll charges.

Q. I want to direct your attention, sir, to page 437 of the record, and I am going to hand you this transcript and I want Mr. Christy to have the page reference.

I asked you about the cards that you had made from Commissioner Murtagh's cards as leads for Costello calls. I am going to ask you if you didn't tell me that cards for the tolls covering Mr. Costello's phone [745] covered approximately 50 or 75?

The Court: Why don't you read him the question and the answer?

By Mr. Williams:

"Q. How many did you make, Mr. Geissler, at the time—"

The Court: The question is do you recall being asked this question and making this answer, which Mr. Williams may now read. A. I do recall that, sir.

Q. Was it accurate, Mr. Geissler, that you made between 50 and 75 cards—

The Court: Why don't you read that answer for him, please.

Mr. Williams: Yes.

The Court: Read the question and answer.

Q. "Q. How many did you make, Mr. Geissler, at the time? A. Cards for the tolls covering Mr. Costello's phone covered approximately 50 or 75. Probably I prepared about 20 or 30 cards covering the various toll numbers which I checked out or prepared cards on."

Do you remember that, sir? [746] A. My explanation to that, Mr. Williams, is that I prepared approximately 50 to 75 cards covering toll calls I received from the telephone company, covering cards on mail watches, and approximately 20 which I prepared from the records of Mr. Murtagh's office, which totaled approximately 50 or 75 altogether.

Q. And they were on Costello calls? A. Yes, sir.

Q. And when you came to examine your records 10 days ago, there were only about what you thought were 10 but what turned out to be less than 10; is that right? A. There are four.

Q. There are four? A. Four.

Q. Was it on the basis of those four cards, Mr. Geissler, that you changed your opinion which had heretofore been that there were local calls in Commissioner Murtagh's office? A. It wasn't on the basis of the cards, Mr. Williams. As I stated before, I examined Mr. Costello's cards. There were toll charges on the cards. In order to insure that I was not mistaken that cards had been mislaid, other cards also indicated toll [747] charges. I mean, there were no local charges on his cards.

Q. What other cards were there besides the four that you produced here? A. I am talking about Commissioner of Investigation's cards, not these, sir.

Q. I am talking about Mr. Costello's cards received from the Commissioner of Investigation. A. I prepared approximately 50 or 75 cards.

Q. And at the time that you were first contacted about this matter by Mr. Christy, I understood you to say Monday that your impression was that there were local calls but

that 10 days ago, after seeing these four cards, you changed your impression? A. No, sir. After seeing the card prepared by the Commissioner of Investigation which was listed solely with toll charges.

Q. Do you mean that you changed your opinion by looking at cards other than relating to this case? A. By looking at the cards that relate to this case and by looking at other cards.

Q. By looking at these four cards and other cards? A. Not these four cards; the cards prepared by [748] the Commissioner of Investigation in which about 75 or probably 80 toll charges were listed.

Q. And whose cards were they? A. The Department of Investigation's.

Q. Referring to what, sir?

The Court: Who was the subject?

The Witness: Frank Costello.

By Mr. Williams:

Q. Do you mean that you saw 75 or 80 Commissioner of Investigation's cards referring to Frank Costello 10 days ago? A. They were listed on two cards. All the tolls were listed on two cards.

Q. Are you talking about the two exhibits that Mr. Christy showed you the other day? A. No, sir.

Q. I have reference to Defendant's E and F. A. I am not talking about that, sir. I am talking about the records of the Commissioner of Investigation which listed the toll charges on Mr. Costello's phone.

Q. Do you have a copy of that, sir? A. I believe Mr. Christy has a copy of it, sir.

Q. And you saw this as a basis for changing your [749] opinion? This was the basis upon which you changed your opinion on the existence of local calls? A. Mr. Wil-

liams, I did not change my opinion. I merely refreshed my memory on the matter. My recollection was that there were toll charges on there, and when I examined the cards I found—I mean local charges, and when I examined the cards I found it was toll charges and solely restricted to toll charges.

Q. Prior to 10 days ago you had the opinion that there were local calls; right? A. I had the impression.

Q. Now, you were here, were you not, when you signed an affidavit which has been on file here in February? A. I was, sir.

Q. At that time you still had the impression that there were local calls in Mr. Murtagh's office; is that correct? A. At that time I had the impression that there were local calls.

Q. Now, before you signed an affidavit on the subject matter you searched your records, did you not? A. I examined the records.

Q. And you talked to Mr. Christy, did you not, on [750] the subject? A. I did.

Q. And at that time did you go into the Murtagh records? A. I did.

Q. And at that time, when you signed the affidavit, in your mind your recollection was still that there were local calls in the Murtagh files; is that correct? A. When I signed the affidavit, my affidavit was based on a review of the Murtagh calls, and I signed that affidavit based on what it said, that there were toll charges involved.

Q. But at the time you signed the affidavit, which was back—the record will show, but I believe—on February 5th of this year, you were under the impression, were you not, or it was your best recollection that there were local calls in the Murtagh files; is that right? A. When I came to New York in the early part of this year, it was my impression that there were local calls in the Murtagh files.

Q. And that impression and recollection remained with

you until about 10 days ago? [751] A. No, sir, it did not remain with me until 10 days ago. I had the impression that it was local calls—

The Court: The point is did there come a time when the impression changed?

The Witness: Yes, sir.

By the Court:

Q. When did that time occur when you changed your impression? A. When I came to New York in February I was under the impression that there were local charges in Mr. Murtagh's office.

Q. You told us that, and you swore accordingly. A. I swore accordingly, yes, sir.

Q. Later on, you said, your impression changed, and what we are trying to find out now is the approximate time at which your impression changed, if you recall. A. I don't recall when my impression changed, your Honor.

Q. Mr. Williams has suggested that it was 10 days ago. You disagreed with that. How long before 10 days ago did the change of impression occur, if you can tell us? [752] A. When I came to New York in February, I had the impression that there were local calls on Mr. Murtagh's records and I explained that matter to Mr. Christy. I also told—Mr. Christy permitted me to examine the records and there were toll charges, and on the basis of those toll charges it refreshed my memory and I found there were no local calls.

Q. When is this? A. This is February, your Honor.

Q. Yes? A. I felt that probably all the cards had not been there and that possibly local cards had not been in Murtagh's files or not been available. So when I came to New York about 10 days ago the impression was there to an effect that probably there were local calls.

– However, I further examined Mr. Christy's files and found that it was restricted solely to toll charges. In order to confirm the fact that it was restricted solely to toll charges, I also examined other cards prepared by Mr. Murtagh's office and they also covered solely toll charges. So I was convinced that the Murtagh records covered toll charges.

Q. Then is it correct that the change of impression [753] occurred about 10 days ago? A. Yes, sir.

The Court: All right. That is what Mr. Williams asked you several questions back. Now we have it straightened out. All right.

By Mr. Williams:

Q. When was it, first of all, that you went to Mr. Murtagh's office to begin your investigation in this case? A. I believe it was 1951.

Q. 1951. A. I believe so, yes, sir.

Q. And at that time you had some assistants with you, did you not? A. Yes, sir.

Q. And you found that Mr. Murtagh, as the Commissioner of Investigations, was making a systematic check on certain telephone lines to ascertain the amount of traffic over them? A. Yes, sir.

Q. And he made those records available to you, did he not? A. Yes, sir.

Q. And you found, further, did you not, that [754] certain of these records, when they indicated a large amount of traffic over a given line, became records not only of toll calls but of local calls?

Mr. Christy: I object to the question, your Honor.

The Court: He is asking him if that is so. Overruled.

A. No, I did not, sir.

Q. Didn't you learn, in working with the Commissioner of Investigation's office, that the police orders were secured for interceptions when there was an extraordinary amount of traffic over a given line in which they were interested?

Mr. Christy: I object to that question, your Honor.

The Court: Overruled.

Mr. Christy: It is assuming a state of facts not in evidence and there is no truth in it that we know of.

The Court: I didn't hear you.

Mr. Christy: It is assuming a state of facts not in evidence.

The Court: He is asking whether or not he knows that is so. I recognize there is no proof of that now, [755] but he is asking this witness whether he knows it and I assume Mr. Williams is asking that as a preliminary to something else.

A. I heard something to that effect.

Q. You knew when you were there in the investigation of this tax case of Costello—

The Court: You said that once before. He has that. He says he knew it and he found out about it. Go ahead. You don't have to sum it up again.

Mr. Williams: I was going to ask another question, your Honor.

By Mr. Williams:

Q. You photostated such records as were made available to you by the Commissioner in this case, did you not?

A. Yes, sir.

Q. And you physically took possession of those records?

A. Yes, sir.

Q. The photostats, that is. A. Yes, sir.

Q. And were they photostats, Mr. Geissler, of all the calls of which Commissioner Murtagh had a record in re Costello? [756] A. They were photostats of all the records that were made available to me.

Q. And how voluminous were those records, sir? A. They covered the records that Mr. Christy has in the files.

Q. Isn't it a fact, Mr. Geissler, that Mr. O'Connor, the secretary of the Commissioner of Investigations, physically had you move out some of these records from his office because he didn't want you there present looking at them because they were so voluminous, it was taking you so much time to analyze them? A. Those records covered thousands and thousands of telephone toll charges. Each card. They were voluminous. But in this particular case for each telephone they had a card. If the volume was heavy, the toll charges were heavy on a particular card, it was put on another card.

In some cases involving bookmakers, you had three or four cards where the traffic on the toll charges was heavy.

Q. But you were working on the Costello case at this point? A. Yes. I was working on two or three other similar cases at the same time.

[757] Q. But I am only asking you about the Costello case at this time. You were there with other agents working on this case, were you not? A. Well, I don't know about working with other agents. Another agent may have accompanied me there on one or two occasions.

The Court: Well, were you there?

The Witness: Yes, sir. Yes, your Honor.

By Mr. Williams:

Q. And it was while you were working on this case that you learned there were interceptions made on police orders in those instances where there was large traffic on lines

in which Mr. Murtagh was interested? A. I heard about it, that's all.

Q. And you saw, did you not, records of phone calls that were made which were local-to-local calls? A. No, I did not, sir.

Q. You did not? A. No, sir.

Q. That is your firm recollection as of today and since 10 days ago? A. Yes, sir.

Q. That you did not see any local-to-local calls in Mr. Murtagh's office? [758] A. That's right.

Q. Can you tell us, Mr. Geissler, approximately how many records or cards were photostated at Commissioner Murtagh's office relating to Costello? A. Approximately two cards that I have there.

Q. Only two cards? A. Yes, sir.

Q. How many days were you down there on the Costello case? A. I wouldn't have been down there a day. An hour. Make inquiry, examine the card, make a photostat of it.

Q. Is it your testimony today that only two cards in the Costello case were photostated at the Commissioner's office? A. Two cards in the Costello case. They covered about 50 to 75 toll charges, these cards. It was a tabulation of toll charges on these cards.

Q. Did you take some other records from Mr. Murtagh's office when you were there? A. Records covering other cases I was investigating.

Q. I am only talking about this case. All my questions are directed to this case, Mr. Geissler. I [759] am not asking you about any other case. A. I did not take any other records.

Q. What did you mean in your testimony the other day when you spoke of 50 or 75 cards, sir, in this case? A. Fifty or 75 toll charges were listed on the records of Mr. Murtagh's office. I prepared 50 or 75 cards covering Mr. Murtagh's office, mail cover, toll charges from the telephone company.

Peter F. Geissler—for Defendant—Recalled—Direct

By the Court:

Q. Do you mean by this that, if you went to the Commissioner's office and found a card or a sheet of paper with anywhere from 5 to 50 telephone numbers on it, you would make a copy of that and then, when you went back to your office, you would make a card for each individual number that appeared on there? A. Yes, sir.

Q. So that the net result might be out of one page from the Commissioner's office you would have many more cards than one? A. There would be—

Q. Will you answer that? Is that yes or no? A. Yes, your Honor.

The Court: We will take a very short recess here because we will be adjourning at 4 o'clock so that [759a] I can go on with something else. We will take a short recess.

(Short recess.)

[760] Q. Mr. Geissler, I want to call your attention to some testimony that you gave on Monday, and this testimony for the purpose of the record is at page 435 of the record at the bottom of the page. My question coming in context concerning your change of mind was this:

"Q. But after talking to him," meaning Mr. Christy, "your opinion changed on that? A. It did not change. The cards indicated that they were toll charges, and my impression that they were local cards was erroneous. He did not persuade me.

"Q. Did you have all the cards when you re-examined them? A. I had the cards. I felt, going through the dates that these toll charges were compiled, I felt that all the cards were there.

"Q. And are those cards now available? A. Yes, sir."

Now, my first question is, Mr. Geissler, those cards which you testified were available are not available? A. They are available, sir.

Q. They are? [761] A. Yes, sir. They are on two cards of the Commissioner of Investigations record, and all these toll charges are on the two cards.

Q. Do you have those in your possession or your custody? A. Mr. Christy has them in his possession.

Mr. Williams: Your Honor, I would like to move at this time that the Government produce those cards which were the basis for this witness' change of opinion in this matter.

Mr. Christy: I do have cards from the Commissioner of Investigation. Of course, they are the Commissioner of Investigation's cards, your Honor, and I don't see that we are called upon to produce those. They deal with toll charges. The witness has testified that they deal with toll charges and that they are not intercepted conversations. Therefore I don't see that they have any relevance to this hearing at all. We are dealing with whether or not witnesses were obtained through intercepted telephone calls, and that is the sole issue at this particular time with this witness. These are toll charges.

The Court: Well, that is not quite [762] accurate. The issue at the moment now is the credibility of the witness. That, Mr. Williams, is attempting to attack. You do have the cards?

Mr. Christy: I do have them. I am not sure whether they are in court, but if they are not, they are down in my office, your Honor.

The Court: Very well.

Mr. Christy: I have them, your Honor.

The Court: Very well. Mark them for identification.

Mr. Christy: Just a minute, your Honor. I have quite a few of them (producing).

The Court: These are photostats?

Mr. Christy: Those are photostats.

The Court: Of the cards that the witness has been talking about that he saw in the Commissioner of Accounts' office?

The Witness: Yes, sir.

The Court: Mark those you have there now.

(Marked Defendant's Exhibit N for identification.)

The Court: N for identification is what purports to be three photostat cards from the Commissioner's office.

[763] *By the Court*:

Q. Mr. Witness, will you look at them and tell us whether those are the photostats of the cards you have been describing and that those are what you saw in the Commissioner of Accounts' office? A. Yes, sir. Yes, your Honor.

The Court: All right.

Q. As I recall your answer to some questions I put to you a few minutes ago, you made from this card or from the original card of which these are photostats— A. Yes.

Q. —individual cards for all of the telephone numbers that appear on this exhibit? A. I don't believe, your Honor, that I made cards for all the numbers.

Q. But some of them? A. Yes, your Honor.

Q. And at one time those cards were in your file? A. Yes, your Honor.

Q. When you looked for them recently you found that they were not present? A. Yes, your Honor.

Q. But it is your contention then that every [764] card you did make out contained information which is now available and reflected on these exhibits here? A. Yes, your Honor.

Q. Very well. Anything that is in here you had the use of? A. Yes, your Honor.

The Court: Very well.

You may see them, Mr. Williams.

Mr. Christy: I would object again to turning these over to Mr. Williams. If it is a question of credibility your Honor can look at the cards to determine if there is anything contradictory in his testimony.

The Court: No. The question of credibility is not quite finished until Mr. Williams gets through with his examination, but in any event the witness has testified that this is material that he used. Now whether it is going to lead to evidence of illegal wiretaps I don't know. And I am not going to foreclose the defendant from the opportunity of having a look at them since the witness says it is something he used in connection with the investigation and that it has to do with telephone calls.

[765] Mr. Christy: Yes, your Honor, but it has nothing to do with wiretap.

The Court: I don't know whether it has or not. I know it has a list of telephone numbers on there, and whether it has or not, may be developed by examination or cross-examination, but nobody will be able to go anywhere with it unless he has that information to start with. On that basis I will allow it.

Mr. Christy: Your Honor, may I call your attention to the fact that an examination of that card by your Honor will indicate that they are not intercepted conversations but long distance calls and toll charges.

The Court: That is right.

Mr. Christy: I think it is perfectly apparent.

The Court: That is right and that is what the witness has stated.

Mr. Christy: Then I don't understand why he should be permitted to see them.

The Court: Well, I have tried to make it clear. If I haven't made it clear, Mr. Christy, I am sorry, but the defendant is going to take a look [766] at them.

(Handed to defendant's counsel.)

Mr. Williams: Your Honor, it may be better if I examined these overnight. I could go on if you want to another five minutes.

The Court: Well, you won't get very far in five minutes, and I have another hearing starting in five minutes. So we might as well take our recess now until 10.30 tomorrow morning.

Mr. Williams: Well, may I ask your Honor if I may take these overnight?

The Court: Well, have you any view on that, Mr. Christy?

Mr. Christy: I would object to it, your Honor.

The Court: Do you object to having Mr. Williams copy them or staying here to examine them in your office?

Mr. Christy: He certainly can do that, your Honor.

The Court: I am afraid you are not going to be allowed to take the exhibit but you may stay here as late as you wish and look at them and make any copy you wish.

[767] Now, the exhibit itself I won't turn over in view of Mr. Christy's objection.

Mr. Williams: If Mr. Christy can be persuaded not to object, your Honor, after court may I take these?

The Court: Well, I am going to start a hearing at four o'clock but I hope to finish by 4.30, but I will

probably be here until a quarter to six in my chambers.

All right. 10.30 tomorrow morning.

(Adjourned to October 10, 1957, at 10.30 o'clock a.m.)

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[768] New York, October 10, 1957;
10.30 o'clock a.m.

Hearing resumed.

Mr. Williams: I have a midnight to eight witness here I would like to put on and let him go home, your Honor.

The Court: Surely.

THOMAS WILLIAM HINES, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

The Court: Mr. Hines, will you keep your voice up and answer in a good loud voice so the attorneys can hear you?

The Witness: Yes, sir.

The Court: Thank you.

Direct examination by Mr. Williams:

Q. Mr. Hines, where do you live? A. I live at 601 Park Avenue, Brooklyn.

Q. How long have you lived there? [769] A. I have lived there since 1938, sir.

Q. Where are you employed? A. U. S. Post Office, 68th Street and Broadway, New York 23.

Q. How long have you been employed by the Post Office Department? A. Twelve and a half years.

Q. How long have you been employed at the Ansonia branch? A. Twelve and a half years.

Q. And what is your job at the Ansonia branch? A. I am a clerk, sir.

Q. Have you been a clerk all those twelve and a half years? A. I have, sir.

Q. Mr. Hines, do you know what the term watch or mail cover means? A. I do, sir.

Q. What shifts have you been working in the past five or six years? A. I have worked the eight—the 12 midnight to 8.30 a.m. for about ten years, sir.

Q. Do you recall a mail watch at any time during your employment with the Postal Department being placed [770] on the mail of a Costello, Frank Costello at 115 Central Park West? A. I do, sir.

Q. Can you give the Court an approximation of the time when that was done? A. If I recall correctly around 1951, 1952 and 1953, there were any number of watches on mail going to Mr. Costello.

Q. Now what is the type of mail that goes to 115 Central Park West? Is it route mail or drop mail? A. It is what we call in the post office drop mail.

Q. Does that mean it goes to the apartment house in a mail sack unseparated as to tenants? A. That is true, sir.

Q. Now what was the practice at the Ansonia branch with respect to mail watches or mail covers on mail which was known as drop mail in the years 1950, 1951 and 1952? A. Yes, sir. The practice at that time and still is for the clerks, the sorters that I happen to be, is to box up this particular mail all during the night as we receive it. We throw it in this [771] particular box going to 115. All recipients, all large recipients of mail, of mail in large

quantities in New York are given a special box which we call a drop box. 115 getting a tremendous amount of mail is on our case and specially held out. We throw all this mail into 115 if we get it. If we have been notified that there is a particular watch we hold it out.

The Court: As you sort it?

The Witness: As we sort it. There are times when we have so much work that we can't; a lot of this mail passes us by. In the morning at the last bell which at that time was around 7.45, that is a signal for a clerk to go around—for each clerk—not each clerk, I beg your pardon, sir—for a particular clerk to go around since this watch is on at 115, to go around and skin out of the box for 115—

The Court: What do you mean by skin out of the box?

The Witness: He takes all the mail out. That is what we call skinning, sir, pulling it out, all of the mail.

The Court: All the drop mail?

[772] The Witness: All the drop mail, and this particular clerk goes through every letter and spot-checks to see that the mail going through for the particular drop is held out—watch.

By Mr. Williams:

Q. What was and is the practice with respect to drop mail in so far as the clerks are concerned when they segregate it? Do they segregate it by address? Do they normally look at the names or do they just look at the addresses as they sort it? A. For the most part, sir, we look at the addresses.

Q. When, generally, does the individual clerk who is boxing mail, as you expressed it, separate drop mail when

he is looking for mail on which there is a watch? Do you understand my question? A. Yes.

Q. When normally was and is that done? What is the practice on that? A. Just at the last bell, sir, as I said before, when the last bell is given, we go around—a particular clerk is assigned to this particular duty because there is a watch for this mail. We go around and skin this particular mail out and we go through every letter, which is usually a large quantity. We hold [773] out—if we happen to find a letter going to the particular individual that the watch is being held on, we hold it aside. Then we tie up all the other mail and throw it in the drop bag so it can make the first trip.

Q. What is done with the mail that is held out for a watch at that time? A. After having tied out the mail, the bulk of the mail going to this particular house, we take the drop mail that we found and we either give it to the supervisor or take it to the supervisor's desk.

Q. In '51, '52 and '53 when did the carriers and when did the drop trucks leave the Ansonia branch? A. At that time, sir, we had three deliveries. The drop mail at that time—we were given the bell at Eighth Avenue, the final bell. We skinned out all the cases, tied out these heavy drops. We made the proper distribution of the particular watch. We gave it to the supervisor. That ended the watch as far as we were concerned. The other mail then went out. If the supervisor had time to receipt this particular watch, he did so. If not, then we assume it went out on the next trip.

Mr. Christy: I object to that, your Honor, [774] as to what he assumed.

The Court: I will allow it.

By Mr. Williams:

Q. Do you in fact, yourself, now write up the records on a mail watch over there? A. I do, sir.

Q. Did you do it at that time? A. I did not, sir.

Q. What time does the mail leave the Ansonia branch now, both the letter carriers and the drop trucks? A. The final bell is given at 8 o'clock in the morning now. The trips go out much later now because we try to clean up everything that is in the station at that particular time.

The Court: Just a minute now. The shifts now go out at 8 rather than 7:45?

The Witness: The final bell is given at 8 o'clock now, sir, because there is only one delivery. At that time there were three deliveries.

Q. How much later does the mail go out from there now than it did back in '51, '52 and '53?

Mr. Christy: I object to that, your Honor.

Q. If you know.

The Court: Overruled.

[775] Do you know?

The Witness: Yes.

The Court: All right.

A. The mail goes out now anywhere from 8:30 to 9 o'clock. The carriers hit the streets by 9.

Q. You actually write up the records on the mail watch now? A. I do.

Q. And—

The Court: Do you mind if I ask a question?

Mr. Williams: No, your Honor.

The Court: When you say you do it, do all other clerks do it?

The Witness:

The Court: No. That is a special assignment?

The Witness: That is a special assignment more or less.

The Court: I see.

By Mr. Williams:

Q. What is your experience with respect to getting the mail on the delivery on which it is supposed to go out, and I have reference to watched mail or covered mail?

Mr. Christy: Now, your Honor, I would object [776] to that. Is he talking about the present or at the time when the mail watch was on Costello? If it is the present, I would object to it. I think it is irrelevant.

The Court: I think so.

Mr. Williams: I will withdraw the question, your Honor.

By Mr. Williams:

Q. What was your experience, Mr. Hines, with respect to watched mail during the years we have been discussing, '51, '52 and '53, with respect to whether or not it made the delivery, the first delivery in the morning?

Mr. Christy: If he knows, your Honor.

Q. If you know. A. I know, sir.

The Court: You do know? You say you do know?

The Witness: Yes.

The Court: Very well. Tell us.

A. There were times when I was assigned to skin this particular mail out and pick out the drop, the watch, if

there was a watch in there. I did so. I tied out the bulk of the mail to be sure that it would [777] make the trip. I then put the other holdout, the watch, on the boss' desk for his receipt and proper disposition, whatever he was supposed to do with it.

At that time, as I said, we had three trips and sometimes the mail just didn't make it because we didn't have it—the mail just laid on the desk.

Q. And what trip would it make, if you know? A. It would make the second trip, which was about an hour and a half later.

Q. What was the usual situation with respect to whether it made the first or second trip?

The Court: Isn't that what he just told us?

Mr. Christy: He just testified to that.

The Court: You asked him if he knew what the situation was and he just told you.

Mr. Williams: I don't know whether his answer was responsive, your Honor.

The Court: You may probe as far as you wish and, if an answer is not what you think it ought to be, you can go ahead and probe, but don't do it in the same way. He has just now told us what the usual way was. If you wish to go ahead, go ahead.

By Mr. Williams:

Q. Do you have a recollection of skinning out, as [778] you call it, 115 Central Park West and looking for a watch on the Costello mail? A. I do, sir.

Q. And would that be after the bell or before the bell? A. At the bell.

Q. At the bell? A. When we are given the bell, that is our signal to skin this particular mail out.

Q. There is one thing I am not clear on, Mr. Hines. In '51, '52 and '53, did the bell ring after the deliveries had gone out or, rather, did you tour end after the deliveries had gone out? A. Yes.

Q. Today your tour ends at the time the deliveries go out; is that right? A. Yes—well, I am off at 8:30 a.m. in the morning, sir. The trips now go out anywhere up to 9 o'clock.

Q. In '51, '52 and '53, what time did you get off? A. I got off at 8:30, sir.

Q. What time did the trips go out then? A. The trips went out at 8 o'clock in the morning. [779] They were supposed to. Eight or 8:15. They were supposed to get out as soon as they possibly could, when we tied out at the bell. As soon as the carrier got every last letter in and tied out—

The Court: It comes to this: the bell rang at a quarter of eight and the rule was to get out as soon as possible but not later than 8:15; right?

The Witness: That's right, sir.

The Court. All right.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. Mr. Hines, when you were sorting the mail during the evening and putting it into the box, didn't you look at the names on the letters at that time? A. I am supposed to look at the names, sir, and I do look at the names, but we are required to do so many letters per minute, sir, and knowing that this box—knowing that this particular watch is being held on this particular mail, we box it by numbers, not names generally. When there is a watch we watch for —we try to check at the same time, scanning the letter and watch the letter. We try to watch the name and the address,

but sometimes it is not possible. I mean very accurately, anyway.

[780] Knowing in the morning, though, that this is going to be checked over, we just go usually by the number.

Q. But you may skin out, as you call it, letters for Costello during the course of the evening; right? A. That's true.

Q. Or on any person on whom there is a mail watch? A. That is true.

Q. And these letters which you had skinned out would be taken over to the supervisor during the course of the evening? A. During the course of the evening.

Q. And then you would get them back before the mail was tied up to go out in the morning, right, with regard to those letters? A. That's true, sir.

Q. So there couldn't have been any delay on those letters you skinned out during the night? A. That's true.

Q. You say there was another check, that is, at the bell at 7:45? A. Yes.

[781] Q. You went through and skinned out any letters that you had missed during the time you were sorting the mail in the evening? A. That's right.

Q. These letters you would take over to the supervisor? leave on his desk or give to him? A. That's true, sir.

Q. What did the supervisor do with them? A. If he had the time, sir, he would receipt it according to the regulation governing watches, if he had the time.

Q. What would he do when he got through making a note of the addressor and the addressor's address? A. Whenever this note has been made, whenever the proper receipt of this letter or letters has been made, this mail is taken over by the clerk or the supervisor that makes this particular receipt, carried to the route and given to whoever might be boxing up the route. We have midnight routers. They work all night.

Thomas William Hines—for Defendant—Cross

Q. So it was perfectly possible that the supervisor would get this mail in the morning which had been skinned out after the 7:45 bell, make a note of the addressor and the address and put it back in the drop before [782] it went out in the morning? A. For the most part, sir, the supervisors were so busy and still are, and knowing that there were three trips at the time, very often the mail was just left on the desk.

Q. Do I understand that on occasion you actually skinned out the mail after the 7:45 bell? A. Quite frequently, sir.

Q. At a time when there was a mail watch on Costello? A. Yes.

[783] Q. And you have put letters that you have out in the morning on the supervisor's desk? A. I have.

Q. Did he give them back to you? A. He is not supposed to, sir. He is supposed—

> The Court: No, that is not the point, whether he is supposed to. The question is did he.
>
> The Witness: No, he didn't give them back to me.

By the Court:

Q. Do you know what his practice was? A. His practice is and the regulations—

Q. Well, at that time. A. Well, at that time—

Q. What was his practice? A. After he had receipted this mail and made note of the receipt of this mail, he takes it over to the route, gives it to the carrier on the route.

Q. Do you distinguish that bag of mail from the drop mail? A. The drop bag—we assume the drop bag is still there. The carrier ties it up—he doesn't tie it up; he throws it into the mail with the rest of the mail.

[784] Q. The drop bag. A. Yes.

By Mr. Christy:

Q. The drop bag you said would go out about 8.15 in the morning? A. As soon as the wagon men—we call them the wagon men—they take it out in the wagon, because it is a tremendous amount of mail and it is heavy. As soon as they get around to it, but they can't pull the bags until the carrier tells them the bag is ready to be pulled.

Q. And the drop mail goes out about the same time as the carrier? A. The drop mail goes out before the carrier.

Q. Before the carrier? A. Yes.

Q. But the carrier leaves very shortly after the drop mail? A. Shortly thereafter, but the drop has been made.

Q. I beg your pardon? A. The drop has usually been made, because he is gone.

The Court: Keep your voice up, please.

[785] Q. And these letters which you may have skinned during the night which you missed in the earlier sorting and you left on the supervisor's desk, the practice was for the supervisor to give it to the carrier? A. Yes.

Q. And the carrier could have put it in the drop bag, is that correct? A. Yes.

Q. Or the carrier may have taken it out himself? A. That is what he is supposed to do.

Q. So there couldn't be any delay in the delivery of these letters, is that correct? A. There couldn't be—

Q. Wait a minute. A. There couldn't be any delay in the delivery of these letters if the supervisor had time to receipt them properly or a clerk, and oftimes we don't do it.

Q. You would give letters to the supervisor and you don't know what he did with them; he never gave them

back to you? A. He didn't give them back to me but I happen to know that they didn't all go out.

Q. But you don't have any personal knowledge [786] of when this supervisor would get through with marking these letters, do you? Once you left them on the supervisor's desk that is all you knew about it? A. Not exactly, sir, because we work in a very small space and I usually know what is going on. In fact the other clerks do, too.

Q. When was the next delivery after 8.15? A. I don't recall, sir, because when I left the post office at 8.30 I went home.

Q. Didn't you say it was about an hour later? A. It was about an hour and a half later or maybe two hours later. I don't recall the exact time. I only know the first trip, sir.

Q. In the event that this mail which you separated during the night did not go out with the drop or the carrier it would have gone out on the second trip? A. That is right, sir.

Mr. Christy: I have no further questions, your Honor.

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[787] Peter F. Geissler, resumed.

Direct examination continued by Mr. Williams:

Q. Mr. Geissler, yesterday when I was asking you questions concerning the number of cards that you had seen ten days ago when you looked over your records, my recollection is that you said that you saw, you thought you saw ten, but it turned out to be four because you were confused between your cards and the Commissioner of Investigation, is that correct?

Mr. Christy: Your Honor, he did say five or ten. Yesterday there was a question of whether it was

ten. Page 437 of the record I think indicates that he said five or ten cards.

A. They weren't cards with the Commissioner of Investigation, Mr. Williams. They were cards and slips.

Q. Well, Mr. Geissler, have you finished? A. Yes, sir.

Q. Well, Mr. Geissler, is this photostat which has been marked Defendant's N for identification the thing which you confuse with your cards? A. No, sir.

Q. Well, didn't you say yesterday, I am referring [788] to page 739, I asked you:

"Ten days ago when you checked these files were there as many as 10 of these cards? A. There were not. These cards were with cards from the Department of Investigation. They were mingled in with cards from the Department of Investigation, and scanning through those cards I had the impression there were about 10 cards. There were slips of white paper in there also."

Then you went on to say how you had uncovered two more cards.

The Court: You had better read the answer. Then there will be no question about it.

Q. "However, in going through Mr. Christy's files before I testified, I uncovered these two cards that I had actually prepared. I then went to the office of the Intelligence Division to see if there were additional cards and I uncovered these two cards.

Now I direct your attention, Mr. Geissler, to that part of your answer where you say these cards were with the cards of the Department of Inve[illegible]ation. They were mingled in with cards of the Department of Investigation, and scanning through these cards I [789] had the impression there were about ten.

When you spoke of scanning through the Department of Investigation cards were you talking about this Exhibit N? A. I was talking about that, Mr. Williams, and there were other cards in there also covering collateral examinations. There were other cards in the Department of Investigation file which Mr. Christy has that covered other cases.

Q. You mean Mr. Christy had in his file of the Costello case cards that related to other cases? A. To my recollection, yes, sir.

Q. And he had those cards in the file which he showed you in this case? A. Yes, sir.

Q. So it was those cards that you were talking about? A. I was talking about those cards. They are comparable to that. There were photostats in the file. There were white slips and two cards I produced yesterday—that were produced yesterday.

Q. Mr. Geissler, were the other cards which Mr. Christy had from the Office of Investigation index cards such as yours which have been produced [790] here or were they photostats, too? A. They were photostats.

Q. Well, did you get confused between the photostats from the Division of Investigation and your cards? A. I didn't get confused, Mr. Williams. There were white slips in there and when I further examined them these slips were not prepared by me. There were certain white slips of paper and between the white slips and the cards I prepared it was my impression there were ten cards there.

Q. Did the white slips of paper relate to this case? A. I didn't examine them too thoroughly, Mr. Williams.

Q. Well, you were examining to ascertain whether or not your recollection was correct when you thought that there were local calls in Mr. Murtagh's files? A. Yes, sir.

Q. Didn't you read the cards which you examined for this purpose? A. The cards I was examining relating to that had nothing to do with local calls in Mr. Murtagh's file; it had to do with the cards I prepared from [791] various sources.

Q. Well, is this the one that you saw ten days ago in Commissioner Murtagh's file relative to this case, and I refer to Defendant's Exhibit N? A. I may have seen a photostat covering—card covering his Port Washington residence.

Q. Well, is that different from Defendant's Exhibit N? A. Yes, sir.

Q. Did that influence you in your thinking when you arrived at the conclusion that they were only local calls in Commissioner Murtagh's files? A. It didn't influence me, Mr. Williams.

Q. This was the thing that influenced you to change your opinion as to whether or not they were local calls? A. That didn't influence me, Mr. Williams.

Q. Well, isn't this, Mr. Geissler, and the Port Washington cards to which you just referred the only thing that you saw relative to the Costello case that purportedly came from Commissioner Murtagh's files? A. I saw other cards relative—I don't know if they were relative to the case or not, but I saw [792] other cards. Mr. Christy had a group of photostats there. I didn't examine those because I was interested in that particular photostat and the one for Port Washington, the one on Port Washington covering these calls. It had local charges on it, from Port Washington to the city. It wasn't local to local, but toll charges.

Q. Then that brings me back to the question, Mr. Geissler: Is that the thing that influenced you to change your recollection of the existence of local calls in Commissioner Murtagh's office, and I refer to this exhibit, Defendant's N? A. It did refresh my memory on it, yes, sir.

Q. And this was the determining factor in the refreshing of your recollection on this subject? A. It wasn't the determining factor.

Q. What was the determining factor? A. I also checked other cards in Mr. Murtagh's office and I found that they consisted solely of toll charges.

Q. Were they cards relative to this case? A. Cards on other cases.

Q. On other cases? A. Yes, sir.

[793] Q. Then you were influenced by what you saw in Commissioner Murtagh's files on other cases in arriving at this conclusion, is that correct? A. I wasn't influenced; it merely refreshed my memory.

Q. Well, what other case did Mr. Christy show you when your memory was changed?

Mr. Christy: Objection, your Honor.

The Court: Sustained.

[794] Q. Mr. Geissler, when you were here in New York in February, didn't you see this exhibit? A. Yes, I did.

The Court: Will you refer to the exhibit by identification.

Mr. Williams: Defendant's Exhibit N. I am sorry.

A. Yes, I did.

Q. You saw it at that time? A. Yes.

Q. And at that time it was your recollection that there were local calls, is that not so? A. It was my recollection —my impression; not my recollection, my impression that there were local calls.

Q. I want to show you Defendant's Exhibit No. N, Mr. Geissler, and ask you if the second sheet on it isn't in all respects a duplicate photostat of the first sheet (handing)? A. It appears to be.

Q. Now I ask you if on this first sheet of this Exhibit No. N you see the letter S besides certain dates? A. Yes.

[795] The Court: Is that letter S?

Mr. Williams: S, your Honor.

Peter F. Geissler—for Defendant—Recalled—Direct

By Mr. Williams:

Q. You have been an investigator for some 12 years; is that correct, Mr. Geissler? A. Yes, sir.

Q. And you were reasonably familiar and are reasonably familiar with the Commissioner of Investigation's files from this and other cases? A. Yes, sir.

Q. Did the letter S mean to you surveillance?

Mr. Christy: If he knows, your Honor.

The Court: He is asking him what it meant to him. The question is did the letter S on that card mean to you surveillance.

A. Mr Williams, I did not make those notations—

The Court: Just a moment. That isn't the question, Mr. Geissler. The question is did the letter S signify to you that that card or the subject in that card was someone who was under surveillance?

The Witness: It could have meant that, your Honor.

The Court: It could have meant anything. The question is what did you understand. That is all [796] Mr. Williams is asking you. What did it mean to you, if anything?

The Witness: It did mean surveillance.

The Court: All right.

By Mr. Williams:

Q. Now, Mr. Geissler, on telephone cards you know from your experience surveillance means interception, doesn't it? A. Yes, sir.

Q. Mr. Geissler, yesterday I also asked you about the number of cards that you had made up yourself from Commissioner Murtagh's files. A. Yes, sir.

Q. And there was some confusion in my mind as to exactly what your answer was and I want to ask you about it, if I may.

Did you make up 75 cards, sir? A. Approximately from the combined source I had, from Mr. Murtagh's file, from the telephone company and mail coverage, I made up approximately 75 cards. Twenty of those cards comprise the records from Mr. Murtagh's office.

Q. Only 20 of them comprised— A. Yes. To my recollection I did not card all [797] of the toll charges listed on Mr. Murtagh's records.

Q. Mr. Geissler, was your answer inaccurate or do you have some explanation for it when you said yesterday—

> The Court: What page?
> Mr. Williams: At page 747 of the record.

Q. When I was asking you about the number of cards that you had made up from Commissioner Murtagh's files, the question was:

"I am talking about"—

Well, I will go back a question so it will be clear:

"What other cards were there besides the four that you produced here? A. I am talking about Commissioner of Investigation's cards, not these, sir.

"Q. I am talking about Mr. Costello's cards received from the Commissioner of Investigation. A. I prepared approximately 50 or 75 cards."

Was that an accurate answer, Mr. Geissler? A. It wasn't inaccurate, Mr. Williams. I said I prepared 50 to 75 cards, to my recollection. Approximately, to my recollection, 20 of these cards had been prepared from the Commissioner of Investigation's office.

[798] Q. Did I understand you incorrectly in assuming you meant in response to this question:

Peter F. Geissler—for Defendant—Recalled—Direct

"Q. I am talking about Mr. Costello's cards received from the Commissioner of Investigations. A. I prepared approximately 50 or 75 cards,"
did I misunderstand you when I thought you mean that you prepared 50 or 75 cards from the Commissioner of Investigation's files alone? A. The 50 to 75 cards was the combined cards that I prepared.

The Court: In other words, in giving that answer you did not intend to be stating that you made 50 or 75 cards from the Commissioner's files alone but you made it from them and other sources?

The Witness: Yes, your Honor.

The Court: All right.

By Mr. Williams:

Q. After these cards were made, you distributed them to the agents who were working with you on the case for investigation; is that correct?

The Court: So that we will know what we are talking about, we have the Commissioner of Investigation's [799] cards, we have got other cards he talked about. Are we talking about the Commissioner's cards or the 20 he made from them or the others that he made? Let's get the question a little more sharply and then we won't have difficulty with the answer.

Q. I am talking now, Mr. Geissler, about the cards that you made from Commissioner Murtagh's files exclusively for the moment.

The Court: You just told us that they numbered about 20.

The Witness: Yes, your Honor .

The Court: All right. Those are the cards you are inquiring about.

Q. Didn't you make cards, Mr. Geissler, for each number that is reflected on Defendant's Exhibit N? A. If I can examine the exhibit—

Q. Surely (handing). A. I made cards for some of these numbers, not all of them.

Q. Not all of them? A. No. Some of these numbers I made cards for.

Q. Did you use any pattern of exclusion? A. No, just selective. I selected certain ones and I made cards for them.

[800] Q. Then my next question is, Mr. Geissler, did you distribute these cards to other agents working on the case for investigation? A. We investigated some of these cards and, when the case was reassigned to Mr. Leath, I gave him these cards and he assigned them to other agents.

Q. And did you yourself investigate leads from these cards? A. I cannot recall if I personally investigated any leads from these cards.

Q. I take it you don't have any of the cards that you made from Commissioner Murtagh's files presently available? A. That's right.

Q. So you are not able to tell us with respect to any particular lead that you got from those cards? A. I can't tell you, Mr. Williams.

Q. You have no recollection on that subject; is that right? A. May I examine the cards, the tolls?

(Mr. Williams hands to the witness.)

A. I can't state definitely, Mr. Williams, whether any action was taken relative to those numbers.

Q. I take it, Mr. Geissler—

[801] The Court: The question you were asked was whether you had any recollection as to whether

or not any of the names that appear on that card turned out to be sources of information from which you got leads, in connection with the Costello tax case. Now, what is your answer to that?

The Witness: One I know that was a source of a lead, I believe. I was not at the trial. I don't know if he was used. I think it was a sanatorium in Tarrytown, New York. I don't know what the result of that inquiry was. I did not handle it.

By Mr. Williams:

Q. When you carded these calls, did you go to the phone company and ascertain the subscriber for each of the numbers called? A. Yes, sir.

Q. Is that the way you did it? A. Yes, sir.

Q. So that your cards reflected a name rather than just a phone number? A. The name, yes, sir.

Q. Mr. Geissler, when you were under the impression, or, I should say, when it was your recollection that you had conducted some portion of your investigation [802] as the result of leads from local-to-local calls, did you at any time report this to Mr. Leath or Mr. Murphy or Mr. Christy?

Mr. Christy: I object to the question, your Honor.

The Court: I can't rule on it yet because it isn't clear to me, Mr. Williams.

Mr. Williams: Do you want me to reframe it, your Honor?

The Court: You can do what you want with it, but I don't understand the question and I don't know whether the witness does.

Peter F. Geissler—for Defendant—Recalled—Direct

By Mr. Williams:

Q. There was a time when you were under the impression that you worked from local-to-local calls as leads; is that right? That was a time prior to 10 days ago? A. Yes.

The Court: Speak up, will you please, Mr. Witness.

The Witness: Yes, sir. I am sorry.

Q. When you were first approached on this subject, did you make a statement to anyone that there were local-to-local calls?

[803] The Court: What do you mean when he was first approached by anyone? Can't you sharpen that up a little more?

Mr. Williams: Your Honor, he signed an affidavit.

The Court: Let's get down to that.

When you say "approached by anybody," the question is so much at large, I can't understand it.

Q. Prior to the time you signed the affidavit which appears on record in this case, did you tell anybody there were local-to-local calls? A. Prior to signing the affidavit in which I stated that to my knowledge there was no use of wiretaps, I had the impression that there were local-to-local calls. The records indicated that my impression was erroneous.

Q. That is not my question, Mr. Geissler. My question is did you state that there were local-to-local calls which formed a basis for investigative leads in this case? A. Did I state to whom, Mr. Williams?

Q. To the Bureau of Internal Revenue or to Mr. Christy. A. No, I did not state that.

[804] Q. At any time have you made a report to that effect? A. I discussed this matter with Mr. Christy when I came to New York in January and told him what my impression was and, when he confronted me with these records, my impression was wrong.

Q. My question is at any time have you made a report that there were local-to-local calls used as a basis for investigative leads in this case?

The Court: I take it you mean a written report?

Mr. Williams: Yes.

The Court: Did you ever make a written report about that?

The Witness: I made a written report to Mr. Leath. He sent—prior to my coming to New York from Albuquerque in January or February of this year, I wrote a report to Mr. Leath and outlined my impression or recollection of the entire situation.

By Mr. Williams:

Q. Do you know whether each of the agents did the same? A. I do not know what the other agents did, Mr. Williams.

[805] Q. When did you make that report, sir? A. I believe it was in February of this year.

Q. In February of 1957? A. Yes, sir.

Q. Was that before or after the time you signed your affidavit, and I will give you the time when you signed your affidavit?

Mr. Williams: The copy with which I was served, your Honor, does not bear the date but I am sure the original on file does. I have only (blank) day of February, 1957.

The Court: I may have the original here. You mean the affidavit in opposition to your motion?

Mr. Williams: I do, your Honor. His affidavit is about the fourth or fifth, I believe.

The Court: Yes. The affidavit was sworn to on the 5th of February, 1957.

By Mr. Williams:

Q. The date is the 5th of February, Mr. Geissler. A. Yes, sir.

Q. Was your report before or after that date? A. It was before that, sir.

Q. It was before that date— A. It was not a report, Mr. Williams. It was a [806] response to a communication that Mr. Leath directed to me. He said that it appeared I would be called to New York in connection with this matter and what is my recollection of this particular situation. So I prepared a memorandum and forwarded it to him.

Mr. Williams: Your Honor, I would like to move at this time that that report be made available to the Court for the Court's determination as to whether there is matter contained therein which would impeach the credibility of the witness.

Mr. Christy: Your Honor, first of all, Mr. Geissler is Mr. Williams' own witness. Secondly, I would say, your Honor, that there is no need to give or to produce this record of what Mr. Geissler's remarks may have been. He testified that he got the information from this card.

Now, this would be the original document. There are no interceptions listed on this card.

The Court: Just a moment. Will you designate it, please, by its number?

Mr. Christy: This is Defendant's Exhibit N. Defendant's Exhibit N contains no interceptions of telephone calls. So it is irrelevant as to what Mr. Geissler's recollection was as to whether he thought [807] there had been local-to-local calls or whether there weren't. These calls on Defendant's Exhibit N—

The Court: I am not sure that I follow that. As I understand the thrust of the examination on this point it is this: At some time the witness made an affidavit in which he said he had had 50 or 75 cards, he also said something about local-to-local calls, and there has been some change in that, is his position, now.

You and I both cannot talk at the same time, Mr. Christy. If you want to answer what I have to say, you had better wait and hear what it is.

Mr. Williams' point is that this witness has concededly modified his testimony in some respects. He wants to find out what the man said originally when he gave this information, and I can see two or three reasons why he would be interested in seeing that report. Whether he is entitled to have it is another thing, but I don't quite get your point that merely because a card has been produced here now, that that answers the whole problem.

Mr. Christy: Your Honor, the witness testified that at one point he had had a recollection that the calls on the cards in the Department of Investigations [808] reflected local-to-local calls. Subsequently on looking at the card he recalled that his impression was wrong, that all of the calls on the card from the Department of Investigation, which is Defendant's Exhibit N, were toll calls. So, therefore, he could not have used any leads from local-to-local calls. They would only have been from toll calls.

The record itself, Defendant's Exhibit N will indicate that they were toll calls. So whether or not his recollection has been changed I think is irrelevant because he could only have gotten the information from this card, which he has so testified.

The Court: That is what you say, but Mr. Williams doesn't necessarily have to accept that.

Well, do you object to making the record available to the Court, which is all that Mr. Williams has moved for?

Mr. Christy: No, your Honor, I will produce it for the Court.

The Court: Let's have that and we will take the next step, if it comes, and do the best we can with it. Do you have it here in Court?

Mr. Christy: I don't have it, I don't believe.

[809] Mr. Leath: I believe, your Honor, it is possibly in my office. I am not sure whether I turned it over to Mr. Christy or it is still in my office.

The Court: Very well. You can check that. Will you be able to do that during the mid-morning recess or would it take some longer time?

Mr. Leath: I could do it at noon, sir.

The Court: Very well. We will take our regular mid-morning recess now.

(Short recess.)

The Court: I will withhold a ruling on your motion. The Government is going to make that available to the Court. So your motion for its production to the Court is going to be complied with.

Mr. Williams: Then I will pass on to another subject, your Honor.

The Court: Yes.

By Mr. Williams:

Q. Mr. Geissler, on Monday you testified, if I recall correctly, that Defendant's Exhibit E, which I am now hand-

ing to you, was in the file of the Costello tax case at the time that you took it over in 1950. [810-811] A. Yes, sir.

Q. Is that right, sir? A. Yes, sir.

The Court: May I see the exhibit so I can follow it?

(Handed to Court.)

Q. And my recollection is, Mr. Geissler, that you said that this list of calls which you found in the file was then carded by you and you proceeded to investigate the leads derived therefrom; is that correct? A. Yes, sir.

Q. And you identified Defendant's Exhibit E as the list of calls which was in the file? A. Yes, sir.

Q. I want to call your attention, if I may, Mr. Geissler, to the left-hand side of this Exhibit E for identification wherein it reads "Carded as a group, 3/26/48, SWC."

Who is "SWC," first of all? A. Mr. Cordes, S. Whitman Cordes.

Q. He is an agent in the Bureau of Internal Revenue? A. Former agent.

Q. He was the agent who was in charge of this case [812] at the time you came into it? A. He was my group supervisor.

Q. Now, that indicates, does it not, Mr. Geissler, that this list of phone calls had already been carded two years before you came into the case? A. I don't know if it was carded. The notation was on there, Mr. Williams. I don't know what action was taken on it. That is Mr. Cordes' notation.

Q. From your experience in the Bureau, Mr. Geissler, what does that mean, "Carded as a group, 3/2"—

Mr. Christy: Objection, your Honor. He has already answered the question.

The Court: I don't think he has.

Mr. Christy: He said he doesn't know.

The Court: All right. If he doesn't know, he can tell us.

By Mr. Williams:

Q. I say from your experience in the Bureau, what does it mean when you have a list of phone calls wherein the marking is made "Carded as a group"? It means that cards were made, does it not? A. It would possibly indicate that cards were made. I don't know. Mr. Cordes could clarify that [813] point.

Q. Does that refresh your recollection, Mr. Geissler, that there was a list of calls in the file at the time that you inherited it other than this particular one? A. I didn't see any other calls aside from that and the photostat.

The Court: You mean you did not see any other list?

The Witness: No, your Honor, outside of that and the photostated copy of calls.

Q. You wouldn't have made cards on these calls if they had already been carded, would you? A. I made cards on some of those calls.

The Court: Do you mind if I ask a question?

Mr. Williams: No.

By the Court:

Q. At the time you took over the file you found this list? A. Yes, your Honor.

Q. Did you note that notation on there bearing the initials of Mr. Cordes? Do you have any recollection now whether—

[814] A. I don't have any recollection of noting that.

Q. At the time you found the list were there cards, individual cards, bearing the names that appear on the list? A. No, sir. No, your Honor.

Q. You had no cards? A. No cards.

Q. And then you proceeded to make a set of cards? A. Yes, your Honor.

The Court: Very well.

By Mr. Williams:

Q. You made a set of cards for the list that you found? A. Yes, sir.

Q. And then you investigated the leads from those cards? A. I may have investigated some of those leads.

Q. What is your recollection, Mr. Geissler, at this time? I know I am taking you back seven years and we don't have the cards. What is your recollection as to how many of those leads you yourself investigated? A. I can't tell you how many I investigated, Mr. [815] Williams.

Q. You can't give us an estimate on that percentage-wise? A. If I look at the list I may refresh my memory on that point.

Q. I want your recollection, if I may have it, independently of the list at this moment, because the purpose of my question is to ascertain whether this is the list in fact from which you made the cards, if I make myself clear. A. I can't give you my recollection at this point without checking the list.

[816] Q. In other words, you have no recollection independently of the list? A. That is right.

Q. Well, now, all of these calls, Mr. Geissler, are calls that were made back in 1946, are they not? A. From the sheet it appears that they were made in 1946.

Q. Now, were the calls made in 1946, four and a half years or four years before you took the case over of suffi-

cient interest to you to justify your carding them up that date and running down a lead? A. Yes, sir.

Q. Do you recall ever having discussed this particular list with Mr. Cordes? A. No, I never discussed it with Mr. Cordes.

Q. Do you recall whether or not that annotation or note was on the list, Defendant's Exhibit E at the time you first saw it? A. My recollection is it was on there when I first saw it.

Q. It was on there when you first saw it? A. Yes, sir.

Q. Now when you saw that on there as part of this group did you ask Cordes was disposition he had [817] made of these calls? A. I did not.

Q. You did not ask him? A. I did not.

Q. You just went out and made new cards and investigated leads from those cards? A. Yes, sir.

Q. Now, when you inherited the file from Mr. Cordes were there expenditures listed in the file of the defendant? A. Not to my knowledge, not to my recollection.

(Last question read at the request of the Court.)
The Court: And the answer is no?
The Witness: No, not to my knowledge.

Q. Well, is there anything in the file concerning moneys that Mr. Costello had received or put out? A. At this point there were miscellaneous information in the file relative to certain activities or financial activities of Mr. Costello. What they are I cannot definitely state.

Q. In other words, your recollection at this time is blank on that? A. That is right.

[818] Q. Now, during the conduct of your investigation in 1950 and 1951, Mr. Geissler, you testified that you put a mail watch on Mr. Costello? A. Yes, sir.

Q. When you testified Monday it was your best recollection that you put it on in 1950? A. Yes, sir.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. And I understood you were going to get your diary or get some information from your diary. Have you done that? A. I have not.

Q. I am sorry. A. I have not.

Q. You have not? A. No, sir.

Q. Are you going to do that for us? A. Yes, sir.

Q. Are you going to find out for us when it was you first put the mail watch on? A. My diary wouldn't indicate when I put the first mail watch on.

Q. It would not? A. No, sir.

Q. Is there any record you would have which would [819] indicate when you put the mail watch on? A. The only record that would be available is there in the files because when I requested the mail watch to the inspector of the Post Office Department, we kept a duplicate copy so the post office would have a record of that.

Q. In any event you are sure that you did not wait a year and a half before putting a mail watch on, aren't you? A. Yes, sir.

Q. You didn't wait until December 26, 1951 to put a mail watch on Mr. Costello, did you, in this case? A. I put it on before that.

Q. And your best recollection is, as you said Monday, that you put it on in 1950? A. I believe I started in 1950, the latter part of 1950.

Q. And you kept that mail watch with continuity as far as you could, did you not? A. Not continuity, Mr. Williams.

Q. Well, Monday I asked you if you had the watch on during the periods of expected billings, namely, the 25th of the month and the 5th of the following month and you testified that that was so, did you not? [820] A. Yes.

Q. Is that the case? A. That is the case. Periodically I put it on to cover the end of the month.

The Court: Did you do it every month?

The Witness: I don't know if I did it every month, but periodically I would put the watch on his mail.

Q. Well, is it your best recollection at this time that you would ask for an order for a mail watch on Costello's mail for those days which covered the billing period? A. Yes.

Q. And you would get back at the end of the watch from the Postal Department the addresses of the senders of mail to him? A. Yes, sir.

Q. And it is your recollection that you got the source of senders on a monthly basis generally? A. I don't know if it was a monthly basis. It was periodically. I can't definitely state which month I put it on or off.

Q. Well, what I am trying to find out from you, Mr. Geissler, is how frequently. Was it bi-monthly? [821] A. About every two or three months.

Q. And that was during 1950 and 1951 and 1952 while you were on the case? A. Yes, sir.

Q. Then, Mr. Geissler, did you card all of the senders of mail to Costello for investigation? A Yes, sir.

Q. And did you then distribute those cards to the people working with you on the case? A. Well, I would like to explain it this way, Mr. Williams: Many of the reports from the Post Office Department did not have to be carded because we already knew about the source; like if he got a bank statement from the Corn Exchange Bank, we knew about it; it wasn't necessary to card it; but other persons who addressed mail to him, we carded it as if they were a new lead.

Q. And then you either yourself would go out and see that person or you would have some agent see him? A. Yes.

Q. To find out what the status of his finances were vis-a-vis Costello, is that it? A. We were attempting to ascertain what dealings [822] the addressor had with Mr. Costello.

Q. You were not interested in anything except money dealings with him, were you? A. Financial dealings.

Q. Financial dealings? That is what you went out to look for? A. Yes.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. Now, you yourself did this during 1950, 1951 and 1952? A. I myself did it. He received many letters from out of town and I dispatched requests to various agents and told them to see these people and find out the nature of their dealings with Costello.

Q. Did you do that, Mr. Geissler, with respect to all local mail? A. Not all of them.

Q. Did somebody else aid you in that? A. Yes, sir.

Q. Who was that? A. I really don't know at this point who assisted me. I did most of it, and I turned these cards over to Mr. Leath when he was reassigned the case.

The Court: The question is while you were doing it. You told us some you did yourself and [823] others you gave to other agents.

The question now is, you told us that some of the out of town matters were sent to agents in other cities, and the question you are being asked now is with respect to local names; did you examine the local names yourself or did you pass over some of the cards to your associates and other agents and have them do it?

The Witness: I may have done some myself and pass some of the cards over to Mr. Leath.

By Mr. Williams:

Q. You say you may have done some yourself. You did some yourself, didn't you? A. I believe I did some myself.

Q. You testified Monday that this was a fruitful source of information but you were not able to say how fruitful without the cards, is that correct? A. I don't know—my recollection is I don't know how fruitful they were.

Q. But you said it was fruitful, did you not, that it did bring about information in the case? [824] A. At this point, Mr. Williams, I cannot—

The Court: The question you are being asked now is didn't you say that on Monday. Do you recall what you said on Monday? That is the point of this question.

By Mr. Williams:

Q. Don't you remember what you said on that subject on Monday? A. I would like to refresh my recollection on it.

The Court: Oh, come on. It is in the record.

[825] Mr. Williams: Would your Honor indulge me. I don't have the page handy but I have a recollection of the testimony.

Q. At page 416 of the record, Mr. Geissler, I asked you the direct question, going back two questions so it will be in context:

"Q. And you received information from the Post Office on a monthly basis or on a weekly basis? A. Periodically. I cannot say whether it is monthly or weekly. Periodically I watched places down there and we received reports from the Post Office.

"Q. Was it your practice to assign some men or do it yourself, namely, go out and interview addressors? A. Yes, sir.

"Q. Was this a fruitful source of investigation? A. It was fruitful but to what extent I cannot say.

"Q. Well, the question I addressed to you, Mr. Geissler, is will your records show precisely how fruitful it was? [826] A. Yes, sir."

Do you recall now that you answered it was a fruitful source of information? A. Yes, How fruitful a source it was, I can't say.

Q. You say all of your records at the time that you left this case were turned over to Mr. Leath; is that right? A. That's right.

Q. That is the Mr. Leath who sits here at counsel table? A. That's right.

Q. And when was it that you physically turned over these records to Mr. Leath? A. It was in May of 1952.

Q. May of 1952? A. Yes, sir.

Q. And thereafter you did not have occasion to see those records until February of this year? A. Well, I saw them periodically. He had control of the records—Mr. Leath.

Q. He had control of them throughout the trial; is that right? A. Yes, sir.

[827] Q. And they were intact at that time? A. Well, what records are you talking about?

Q. Your cards. A. The cards?

Q. Yes. A. My recollection of the cards is that I turned them over to Mr. Leath when he was assigned to the case and that is my last recollection of the cards.

Q. Did you then leave the case? A. No, I was still—

Q. You still stayed on the case? A. Yes.

Q. So you still had access to your records? A. But I—I had access to the records but I turned these records over to him and I had no further interest. What disposition he wanted to make of the records, that was under his jurisdiction.

Q. Getting to your assignment in this case, prior to the trial, immediately prior to the trial, you were going to find out for us, as I recall, specifically when it was that you conducted the investigation into the income tax returns of the prospective jurors. Have you found that out? A. I conferred with Mr. Murphy on that point. [828] I had not called Albuquerque for my diaries. He informed me that it was approximately during March of 1954.

Q. It was in March of 1954? A. Yes.

Q. You aren't able to fix the exact date but you know it was in March? A. It was approximately in March.

Q. And it was at this time that you examined the returns? A. Yes, sir.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. Now, have you conferred with Mr. Murphy concerning your reports on the income tax returns of the jurors? A. I discussed the matter with him that I submitted a report to Mr. Murphy. I told him I submitted a report and he acknowledged that he had received this report.

Q. Have you seen the report since I interrogated you on this subject the other day? A. No, sir.

Q. Is the report in existence, to your knowledge? A. I do not know.

Q. Didn't you discuss that with Mr. Murphy when [829] you talked over with him the jury matter? A. Yes, I discussed it with Mr. Murphy. I had the report—I made the report—

The Court: The question is, I think, Mr. Williams, a little vague. If you sharpen it a little bit, maybe we can get a more responsive answer.

Q You talked to Mr. Murphy about the investigation of the jury, did you not? A. Yes, sir.

Q. And during your conversation with Mr. Murphy you discussed the fact that you had given him reports on the income tax returns of the prospective jurors, did you not? A. Yes, sir.

Q. Did you find out during that conversation or in any other conversation since Tuesday whether those reports are still in existence? A. I did not find out.

Q. You don't know at this time? A. I do not know.

Q. Those reports that you made on the returns were made, as I understand it, on yellow foolscap paper. A. Yes, sir.

[830] Q. And that is the form they were in when they left your hands? A. Yes, sir.

Q. And the report consisted of an analysis of the returns of the jurors? A. I wouldn't say it was an analysis, Mr. Williams. It was merely—it covered an inspection of the returns, any information—I would say general information covering the particular return.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. You listed unusual deductions, did you not? A. I did.

Q. And you listed unusual occupations, did you not? A. Well, I made it a practice to list all occupations, all occupations on the return.

Q. Did you make any classification, Mr. Geissler, as to what would be good or bad jurors? A. I made no classification whatsoever.

Q. Was there a classification made, to your knowledge? A. I do not know.

Q. Were you present at the time? A. I was present at the first day of the trial.

Q. Did you see the jury that tried the case in the [831] jury box? A. I don't believe the full jury had been impaneled on the first day.

Q. Did you hear the names of the jurors? A. Beg your pardon, sir?

Q. Did you hear the names of the jurors when you were present? A. I did hear some names.

Q. Were they names of persons whose tax returns you had looked into? A. I can't say if they were names of persons whose tax returns I had inspected.

Q. Well, do you know, Mr. Geissler, whether the panel from which the Costello jury was picked was the panel which you investigated? A. I do not know.

Q. You don't know that? A. I merely inspected these returns. Now, whether the jury was selected from those returns, I do not know.

The Court: Whether the jury was selected from the panel?

The Witness: Yes. I do not know.

Q. Did you yourself keep any record of your [832] investigation of their returns? A. No, I did not.

Q. Mr. Geissler, other than unusual deductions and unusual occupations and irregularities, I believe you called

them the other day, what else did you put down on your report to Mr. Murphy? A. That's about all I put down, Mr. Williams. I made no other notations, other than that.

Q. When you were directed to do this job, what was it that Mr. Murphy asked you to get for him in the way of information from these returns? A. He merely asked me to inspect the returns and he left it to my discretion to make the appropriate notations from the particular returns.

Q. Didn't he tell you what you were doing it for? A. Yes, I knew what I was doing it for. I mean, I had an indication what it was for.

Q. I am sorry. A. I had an indication what it was for.

Q. He didn't just tell you to go up and inspect some income tax returns without telling you what facet of the return he was interested in, did he? A. He indicated to me that they were in connection [833] with the panel.

Q. The Panel—

> The Court: That isn't what Mr. Williams asked. Mr. Williams' question is—will you repeat that question.
>
> (Question read.)
>
> The Court: Do you understand that question?
>
> The Witness: Yes, I do, your Honor.
>
> The Court: All right. Answer it as well as you can.

A. He didn't tell me what facet. He left it up to my discretion to examine the return and give him a report on the returns filed by these various individuals.

Q. And the sole information that you had when you went up there is the information you got from Mr. Murphy that these were prospective jurors in the Costello case and "go up and get any information that would be of interest to us on that subject"; is that right? A. That's right.

Q. So you made the determination as to what would be of interest? A. That's right.

Peter F. Geissler—for Defendant—Recalled—Direct

Q. And what things did you report as matters of interest in your mind to Mr. Murphy? [834] A. As I stated before, Mr. Williams, I reported the taxpayer's occupation, his source of income, the amount of income, his taxes, if there was a refund involved, and, on page 3 of the return, if there were any unusual deductions.

Q. Was there some significance to a refund? A. Well, in some cases relatively large refunds were indicated on the return.

Q. What did that mean to you?

Mr. Christy: Objection, your Honor.

Q. Why did you report that, sir, to Mr. Murphy?

The Court: Overruled.

A. Because it was of interest.

Q. As a tax man, did you feel that persons in that category would not be reliable jurors?

Mr. Christy: Objection.
The Court: Sustained.

By Mr. Williams:

Q. Did you have any reason, sir, for thinking that this matter would be of interest to Mr. Murphy? A. Yes.

Q. What was that reason?

Mr. Christy: Objection, your Honor.
The Court: Sustained.

[835] Q. So that the information that you reported to him was, of course, the name, the address, the source of income, the amount of income, the deductions; is that correct? A. Not the deductions; any unusual deductions.

Q. What do you mean by "unusual deductions," sir? A. Well, if he took a loss in connection—took a loss or if they had unusually large contributions, things of that nature.

Q. Those were the things you reported? A. Yes.

Q. Unusual losses or unusual contributions? A. If they appeared to be inconsistent with the amount of income that the man reported, I would make a notation of it.

Q. Did you make a notation of those cases where you had substantial income and just standard deductions? Did you report that? A. I reported that, that's right.

Q. In other words, with respect to every juror you gave—

The Court: You mean every return?

Mr. Williams: Every return. I am sorry.

[836] *By Mr. Williams:*

Q. With respect to every return you gave the source of income, the amount of income, the scope of the deductions, the contributions that were made and anything that attracted you outside of that as an irregularity; is that right? A. That's right.

Q. Did you list the dependents? A. I believe I listed the dependents, yes, sir.

The Court: By name or number?

The Witness: By number, sir.

Q. You did not identify them? A. No. My recollection at this point is that I did not identify the dependents.

Mr. Williams: Your Honor, for the purpose of this examination I have served a subpoena when this hearing first opened and I have examined the subpoena—

Colloquy

The Court: You served a subpoena on whom?

Mr. Williams: On Mr. Leath, some months ago, and I have examined it and I would like to read the language of it to your Honor, if I may.

The subpoena called for all papers, records, documents, files, memoranda, diaries and reports which were received, made, maintained or utilized [837] in any manner whatsoever, either directly or indirectly, in connection with the tax investigation or prosecution of Costello.

Now, I am not urging upon your Honor the validity of the subpoena as it now stands, but I am asking your Honor this, that in the light of this subpoena and in the light of the fact that it does encompass these particular reports which are now germane, I am moving that your Honor cause the Government to produce those reports at this time for cross-examination of the witness—for examination of the witness.

The Court: What reports? These reports that this witness talked about?

Mr. Williams: Yes.

The Court: Let me see the subpoena.

(Mr. Williams hands to the Court.)

The Court: Was any return made at all with respect to this, or was there an understanding you didn't want them produced until you called for them at this hearing?

Mr. Williams: No return was made, your Honor, but Mr. Christy advised me there would be resistance to the subpoena and we let it remain in status quo until the individual issue arose with respect to [838] specific items.

The Court: Then in so far as your present motion is based upon this as a valid subpoena requiring the production of that document, I do not think the subpoena is valid, but that doesn't dispose of the issue. We will find out whether or not there is any such report as this in existence.

Mr. Christy: We would have to check our files on that. Mr. Murphy says he doesn't know if it is available or if it is still extant. We will check our files.

The Court: Very well.

Mr. Christy: And reserve the right to argue on whether it should be produced.

The Court: Yes, that is another question altogether. I just want to find out if it is in existence.

You had better take back your subpoena.

So that the record will be perfectly clear, Mr. Williams, and not to use any issues that may arise with respect to the propriety of the subpoena, the obligation of the Government to obey that subpoena, I want the record to be perfectly clear that when I called on the Government to answer the question whether [839] or not this report that you are now discussing is in existence, I did not do it because I believed that the subpoena commands the production of it and I make no ruling whatever either in favor of or against the validity of the subpoena. That question is not before me.

Mr. Williams: Yes, sir.

The Court: So that everybody's rights with respect to the subpoena are preserved and may be asserted and resisted at the appropriate time, if that ever arrives.

[840] Mr. Williams: Your Honor, we have two documents that are still in the state of limbo in that we don't—

The Court: Well, you would hope they are in a better place than that.

Mr. Williams: We don't know whether we are going to get them or not and they are necessary to go forward with the examination of this witness. If your Honor sees fit to give them to me I would go forward with the examination of this witness based on those documents.

The Court: Would it be your preference to wait and do that rather than to interrupt again and go forward with another witness?

Mr. Williams: I think so, your Honor. One of the difficulties that presents itself is that the witness whom we

would call in the next order of sequence is Mr. McElligott who is I understand ill, and I have discussed this morning with Mr. Christy his absence, and my suggestion is, your Honor, that while the Government looks for the documents which we have just been discussing and while it ascertains whether or not it has the report that Mr. Geissler filed with Mr. Leath, that perhaps it might be [841] appropriate to adjourn at this time with the understanding—

The Court: Do you think it might take some time to check the files on that?

Mr. Leath: Yes, sir.

The Court: All right. We will adjourn until 10:30 tomorrow morning then.

Mr. Christy: May we have the two documents you are talking about? The list you just alluded to a minute ago and what was the other one?

Mr. Williams: The other was the report that Mr. Geissler said he gave to Mr. Leath which I understood from Mr. Leath he was going to produce for your Honor.

The Court: That was the one that Mr. Williams said he thought he should be allowed to have to see whether there was any consistency between what appeared in that report and what appears here, and that was a report as I recall it that had to do with these leads, so-called leads.

Mr. Christy: That is right, from the Department of Investigation. I recall it now, your Honor.

The Court: Yes. And if it is produced [842] it would be merely presented to the Court for examination and then such disposition as appears appropriate at that time. The other one is the report with respect to the examination of the returns of these people whose names appeared on the panel of jurors in March or whatever it was.

Mr. Christy: Yes, sir.

The Court: All right.

We will adjourn now until 10:30 tomorrow morning.

(Adjourned to October 11, 1957, at 10:30 o'clock a. m.)

Colloquy

[843] New York, October 11, 1957,
10:30 o'clock a. m.

(Hearing resumed.)

Mr. Williams: Your Honor, Mr. Geissler was still on the stand at the conclusion of yesterday's session and we had those two documents, one of which was going to be produced for your Honor and the other of which I believe Government counsel was going to advise your Honor concerning.

The Court: Very well.

Mr. Christy: Your Honor, with regard to the document which we agreed to produce for your Honor, I do have that here. That is the memorandum which the witness Geissler directed to Mr. Leath earlier this year, January 15th, to be exact.

The Court: That is as to the examination of the returns?

[844] Mr. Christy: No, your Honor. This is the document Mr. Geissler prepared in response to a request from Mr. Leath regarding his investigation of the case.

The Court: Oh, yes.

Mr. Christy: The other document, which was the sheaf of yellow papers that Mr. Geissler said he prepared, we have searched the files in both this office and the files in the office of the Internal Revenue have been searched and we don't find any such papers that Mr. Geissler referred to.

The Court: The sheaf of yellow papers is the one that related to the checks on tax returns of prospective jurors?

Mr. Christy: That is right. The papers he prepared upon an inspection of what returns he could find when he was sent up to the various districts.

The Court: All right.

Mr. Christy: That we do not have.

Mr. Williams: Your Honor, I would like to ask—

The Court: Just a moment, please.

Yes, Mr. Williams.

Mr. Williams: Your Honor, counsel has announced that the original yellow notes of Mr. Geissler [845] on the income tax returns are not present. May I ask if your Honor will inquire about secondary evidence on that subject? I have specifically in mind this, your Honor: that perhaps the notes which were prepared by Mr. Geissler when he examined the returns, and, as I understand, simultaneously with his examination of the returns, may have been transcribed into a secondary form of evidence by either Mr. Murphy or Mr. Leath or some other agent in connection with the case.

For purposes of examination of the witness, may I inquire if your Honor would ask the Government if there is such evidence?

The Court: How about that? Do you know?

Mr. Christy: Your Honor, we are unable to find the notes that Mr. Geissler prepared from an inspection of the returns or any other papers on which this information was transcribed or copied in any way.

The Court: Very well.

Mr. Williams: Is your Honor going to examine the exhibit that has been offered?

The Court: Yes, but that is another matter. I take it this is a representation by the Government in answer to both your questions and disposes of the [846] first matter we took up this morning.

Will you now let me see the other document.

First of all, that will be marked Court's Exhibit 1 for identification at the present time. If it comes into evidence it will get whatever is the appropriate marking.

Mr. Christy. Your Honor, I understand that this is being turned over to the Court for the purposes of determining if there is anything inconsistent in this report with the witness' testimony.

The Court: I so understand.

(Court's Exhibit 1 marked for identification.)

[847] The Court: I think, Mr. Williams, I will have to ask you to proceed without decision on this at the moment. You have examined Mr. Geissler at some length about this yesterday. My recollection of what he said yesterday is not sufficiently clear for me now to decide this and I would like to have the opportunity to re-read Mr. Geissler's testimony as transcribed.

All right.

Mr. Williams: Your Honor, in the interest of the record may I ask the witness when he comes to the stand if this document which is in the possession of the Court is the one which he has referred to?

The Court: Yes, that is quite all right. Yes. Let us call him, and if it is going to upset your plan of procedure today to go on to some other subject, we could take a recess now and I will go into the robing room and read these minutes, and that might be just as good as putting it off until some other time. It won't take me too long to read yesterday's testimony.

Mr. Williams: I think that would be much better.

The Court: All right. We will do that, [848] but we shall identify this now.

PETER F. GEISSLER, resumed.

Direct examination (continued) by Mr. Williams:

Q Mr. Geissler—

The Court: Do you mind if I—

Mr. Williams: No.

By the Court:

Q. Do you recall yesterday, Mr. Geissler, you were questioned concerning a report which you said you had made to Mr.— A. Leath.

Peter F. Geissler—for Defendant—Recalled—Direct

Mr. Christy: Leath, your Honor.

Q.—Leath, concerning the matter of these cards that you made out? A. Yes.

Q. And information that you said you had received from the Commissioner of Investigation's office? A. Yes.

Q. Now I hand you this paper which is now marked Court's Exhibit 1 and I ask you to look at it and tell me whether or not that is the report which you described yesterday? A. Yes, your Honor.

[849] Q. Is that the whole of the report as you prepared it at that time and submitted it? A. Yes, your Honor.

Q. Very well. There were no other parts to it? A. No, your Honor.

The Court: All right. Do you have a question?

Mr. Christy: Do I, your Honor?

The Court: No. Mr. Williams.

Mr. Williams: No.

The Court: That is sufficient identification?

Mr. Williams: Yes.

The Court: Very well. All right, then, we will take a recess here now and I will go in and check the minutes of yesterday's hearing with respect to it.

Mr. Christy: Your Honor, just one thing.

The Court: Did you have something, Mr. Williams, you wanted to suggest?

Mr. Williams: No. I think there was some testimony on this facet of the case also on the first day. That may be in your Honor's mind.

The Court: Well, you probably have your notes as to just where this matter comes up.

[850] Mr. Williams: I could look through them while your Honor is reading that.

The Court: Yes, and you let me know.

Mr. Christy: I was just going to say, your Honor, since we have handed the Court the original of that memorandum and it may be retained by the Court, may we have leave to substitute a photostat some time later?

The Court: Oh, yes.

All right.

(Short recess.)

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[851] The Court: The Court has examined Court's Exhibit 1, which is the original memorandum prepared by Mr. Geissler on January 15, 1957, concerning which he has testified. I have compared that with the witness' testimony given yesterday. I have compared it also with the testimony which you, Mr. Williams, called to my attention on pages 430 to 440 and pages 744 through 767.

I find that there is no contradiction between any of the testimony given there and the contents of the memorandum. Accordingly, Mr. Clerk, you will take this Court's Exhibit 1 and place it in an envelope and seal it, mark the envelope "Court's Exhibit 1." When you have it sealed let me have it so I can endorse my name on it and it will be made available for an appeal, if there be an appeal, or any subsequent review from this decision.

Mr. Christy: Excuse me, your Honor. May we substitute a photostat?

The Court: Do you have a copy of it now?

Mr. Christy: I don't have it now, your Honor. I can have one made this morning, though.

The Court: Very well. Then I will hold the exhibit. Have you anybody in your office here [852] that you can send down and have a copy made?

Peter F. Geissler—for Defendant—Recalled—Direct

Mr. Christy: I do. There is one man back here who can take it down, your Honor.

Mr. Williams: Your Honor, for the purpose of the record, in the event that at a later date the Supreme Court of the United States may feel that the statute which was passed in the last session of Congress and enacted into law does not adequately protect the procedural rights of the defendant and that the Jencks rule should be reinstated, I would like at this time for the purpose of the record to ask if I may inspect the document.

My previous motion, your Honor, was that your Honor inspect it for purposes of ascertaining whether I might. I simply state this for the purpose of the record.

The Court: Mr. Williams, I will make no ruling now with respect to what may happen later on in the event of rulings not yet made or statutes not yet passed. I take it that, if you are of the opinion at some subsequent time that the law gives you a right to something which you have not had before, you will take whatever steps you think necessary to enforce that right, but the record will show that you made the request that you have just made. Very well.

[853] Mr. Williams: I have a few more questions on direct with this witness, your Honor.

The Court: Yes, very well. He is being brought in.

PETER F. GEISSLER, resumed.

Mr. Williams: May I proceed?

The Court: You may.

Direct examination (continued) by Mr. Williams:

Q. Mr. Geissler, during the period from July 1950 through the middle of 1952 you were actually in charge of

the investigation of the Costello tax case, were you not? A. Yes, sir.

Q. You were directly in charge of these agents who were working on this particular case? A. Yes, sir.

Q. And those agents who were working on this particular case reported to you with respect to their activities, did they not? A. Yes, sir.

Q. Now I understood you to say the other day that Mr. Sohn was working on it? A. He was assigned to the case, yes.

[854] Q. Was Mr. McElligott likewise assigned to it? A. Not during that period, sir.

Q. Who was working directly under your supervision during that period? Now you have already told us about Mr. Bennett and Mr. Wolf. A. From July 1950 to October of 1951 Mr. Sohn and myself were the only two agents assigned to the investigation.

In October of 1951 Mr. Cordes assigned Mr. Bennett, Mr. Handelsman and Mr. Wolf to assist us.

By the Court:

Q. Just a minute. In October 1951 until when? A. To approximately May of 1952.

Q. Well, did Sohn continue to work with you? A. Yes, your Honor.

Q. Who were the others? A. Mr. Wolf, Mr. Bennett, and Mr. Handelsman.

By Mr. Williams:

Q. And they were the only agents who worked on the case under you, is that correct? A. Yes, sir.

Q. And thereafter you turned over your files to Mr. Leath? [855] A. Yes, sir.

By the Court:

Q. Did you leave the case in May of 1950? A. I was still assigned to the case under the supervision of Mr. Leath.

Q. You were no longer in charge? A. That is right, your Honor.

By Mr. Williams:

Q. Now during the period when you were in charge Handelsman, Wolf and Bennett were the only special agents, is that correct, working with you? A. Mr. Wolf was a special agent and Mr. Handelsman and Mr. Bennett were classified as acting special agents.

Q. Mr. Sohn as distinguished from a special agent was a revenue agent, is that correct? A. That is right.

Q. Now, did Mr. Handelsman and Mr. Bennett and Mr. Wolf give you reports as to their activities during the case while you were in charge? A. Yes, sir.

Q. And were they in liaison with other investigative agencies, to your knowledge? A. To my knowledge they were not in liaison [856] with other investigative agencies.

Q. Did you yourself secure information from the Police Department of New York in this case? A. No, sir.

Q. Did they to your knowledge? By they I mean the men whom I have just alluded to, Mr. Handelsman, Mr. Bennett and Mr. Wolf.

Mr. Christy: I would object to the question as to whether these men secured information from the Police Department, your Honor. I think the question is whether there were any wiretaps made and not general information.

The Court: Overruled.

A. To my knowledge they did not.

Q. Did they assist you in running down leads which you received from the mail cover? A. Yes, sir.

Q. Each of them did that? A. To a certain degree.

Q. You mean each of them actually on occasion did run down leads that you had received through the mail watch which was placed on Costello's mail, is that correct? A. Yes, sir.

[857] Q. Did they also run down leads from the cards that you prepared on telephone calls? A. Yes, sir.

Q. Each of them did that? A. To my—it is my recollection that they did at some portion of that time. However, I cannot state how active they were in that phase of the case.

Q. Now, Mr. Geissler, reverting momentarily to the yellow slips, I should say the yellow sheets which you prepared in conjunction with your investigation of tax returns in Upper and Lower Manhattan and in Albany in March of 1954, approximately how many sheets were there when you turned those sheets over to Mr. Murphy? A. I cannot definitely state how many sheets there were in connection with the preparation of this report, Mr. Williams. However, it could have been 15 or 20 sheets. I mean approximately. I can't definitely state at this time how many sheets I turned over to him.

Q. Isn't it a fact, Mr. Geissler, that you examined the returns of approximately 250 persons in March 1954? [858] A. It is my recollection, Mr. Williams, that I examined approximately 150 individuals.

Q. Have you now checked your diary on this subject by telephoning Albuquerque? A. I have not, Mr. Williams. My diary would not indicate the number of returns that I examined.

Q. But it would indicate the date as I understood your testimony? A. The date I visited the various offices.

Q. And you have not done that? A. I have not.

Peter F. Geissler—for Defendant—Recalled—Cross

Q. When are you going to do that for us, Mr. Geissler? A. I can do it—there is about three hours differential in time—I can do it at the noon hour.

Q. That will show the date on which you made the examination? A. The date I visited the various offices.

Q. And you are able to fix that now only as March 1954? A. Approximately March 1954.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy.

Q. Mr. Geissler, in March of 1954 you were [859] instructed by Special Agent Murphy to go to these districts and inspect some returns, is that correct? A. Yes, sir.

Q. This was done without any question before the trial commenced? A. Yes, sir.

Q. You did not do anything, Mr. Williams, with the returns except look at them, is that correct? A. I inspected them.

Q. You did not bring any of those returns back to Mr. Murphy? A. I did not.

Q. You did not turn over any of those returns to anybody in the United States Attorney's office? A. I did not.

Q. You did not remove any of those returns from any of the offices in which you inspected them? A. I did not.

Q The only person you gave this information to was Mr. Murphy, is that correct? A. That is correct.

Q. And do I understand upon inspection of the returns you noted down the address of the taxpayer? A. Yes, sir.

[860] Q. The occupation? A. Yes, sir.

Q. The marital status? A. Yes, sir.

Q. The number of dependents? A. Yes, sir.

Q. Income? A. Yes, sir.

Q. The source of income? A. Yes, sir.

Q. The tax paid? A. Yes, sir.

Peter F. Geissler—for Defendant—Recalled—Cross

[862] Q. An examination would mean to you that you went out and did some investigation on the return? A. You conduct a further inquiry into the status of the return.

Q. And you did not conduct any such examination on any of these returns? A. I did not.

Q. And you did not recommend any action as to any of the taxpayers whose returns you looked at? A. I never recommended any action.

Q. And you did not initiate any preliminary investigation with regard to any of these returns that you looked at? A. I did not.

Q. And you did not recommend any further examination of the returns? A. I did not recommend any further examination.

Q. And you never got any copies of any of these tax returns? A. I did not receive any copies of the income tax returns.

Q. And to your knowledge, no person whose tax return was inspected by you was ever interviewed or talked to prior to the trial? [863] A. To my knowledge, no person was interviewed or talked to.

Q. Mr. Geissler, you identified Defendant's Exhibit N as a card that you obtained from the Department of Investigations? A. Yes, sir.

Q. And you have inspected this? A. I have.

Q. And that reflects only toll calls on it? A. That's correct.

Q. Now, yesterday you were asked about the letter S which appears in the lower left-hand corner of the first page and I think you said that your impression was that that referred to surveillance; is that correct? A. That's right. I stated, I believe, it could have referred to surveillance. I don't know if I definitely stated it was surveillance because I did not prepare this card.

Mr. Williams was questioning me about my experience in contacting the Department of Investigations, would that

Q. And whether there was a refund? A. Yes, sir.

Q. And any unusual deductions, I think you said? A. Yes, sir.

Q. And that was all? A. That's all.

Q. You weren't assisted by anyone in this work, were you? A. I was not.

Q. And none of the persons whose returns you inspected was aware of such inspection? A. To my knowledge, they were not aware of this [861] inspection.

Mr. Williams: I think perhaps that is objectionable because I don't know that he would know.

The Court: He just said he didn't know.

Mr. Williams: To his knowledge.

The Witness: That's right.

Q. To your knowledge they were not? A. That's right.

Q. You never conducted any examination of these returns as distinguished from an inspection? A. No, sir.

The Court: Do you mind if I ask a question here?

Mr. Christy: Yes, sir.

By the Court:

Q. Did you at any time after you examined those returns communicate with any of the taxpayers whose returns you had looked at? A. I did not, your Honor.

The Court: Very well.

By Mr. Christy:

Q. When you say "inspection," you mean that you merely looked at the information on the return? A. Yes, sir.

have any connotation. I said it could have been but I definitely do not know because I did not prepare this card.

Q. Do you know what that S refers to? [864] A. I this morning visited the offices of the Department of Investigation and questioned Mr. Spitalnik, who was associated with this particular activity of preparing these cards. Mr. Spitalnik informed me that the S indicates that the New York Telephone Company had been served with a subpoena requesting the production of toll charges covering this particular telephone listing and that when the toll charges had been received it was marked N on a certain date.

I further had a telephone conversation with Mr. Tully, who is associated with the Department of Investigation, and during this conversation he informed me that he had a copy of a subpoena covering the production of toll charges which had been issued to the New York Telephone Company on February 11, 1948, as indicated by this here record. I asked him if he had—

> The Court: By "this here record," you mean Defendant's Exhibit N?
>
> Mr. Christy: Defendant's Exhibit N, your Honor.
>
> The Witness: Yes, your Honor.
>
> The Court: All right.

[865] A. I further asked Mr. Tully if he had any subpoenas covering the various other S and N dates indicated on the card, and he informed me that he did not have them in his possession but that the files could—he would examine the files and see if he could produce them.

Q. In other words, the S down here with the 2/11/48 is the date the subpoena was served, and the notation alongside that, N 2/20/48, reflects the date on which the return was made on the subpoena? A. That is the date that the toll charges were received according to Mr. Spitalnik.

Q. And it has nothing to do with surveillance? A. No, sir.

Q. And nothing to do with wiretaps? A. No, sir.

Q. Do you know if the Department of Investigations ever installed a wiretap on the phone of Frank Costello? A. I do not.

Q. You do not know? A. I do not know if the Department of Investigations ever installed a wiretap on Mr. Costello.

Q. During the time, Mr. Geissler, that you worked on the Costello case you never saw a transcript of an [866] intercepted telephone conversation of the defendant Costello, did you? A. I never saw a transcript of an intercepted telephone conversation.

Q. And you never saw a plant card? A. I never saw a plant card.

Q. And you were never aware that any tap had been put on Costello's telephone by any federal agency? A. I was never aware that a tap had been placed on Mr. Costello's telephone by a federal agency.

Q. You never requested any information from any agency about wiretaps, did you? A. I never requested any wiretap information.

Q. You did not go over to Mr. Hogan's office, did you, and see any wiretap information over there? A. I did not visit Mr. Hogan's office.

Q. And you never received any information from any agency about wiretaps? A. I never received any information from any agency about wiretaps.

Q. You never requested any agency to put in a wiretap on the defendant Costello? A. I never requested an agency to put in a wiretap.

[867] Q. Mr. Geissler, you were given a file by Mr. Cordes when you first started working on the case in July of 1950; is that correct? A. That's correct.

Q. That file was a very small one, wasn't it? A. Yes, sir.

Q. And you looked through the file, did you not? A. I examined the file.

Q. And it was apparent to you, was it not, that there had been no investigation up to that date with regard to any income tax case against Costello? A. From the file it appeared that an active investigation had not been conducted prior to its assignment to me.

Q. And you said, I believe, that you found two memoranda in the file which you have previously identified as Defendant's Exhibits E and F. The information on Defendant's Exhibit E did not stem from any wiretaps on the defendant Costello to your knowledge? A. Mr. Christy, I do not know where the information on Defendant's Exhibit E originated.

Q. But looking at that exhibit, all that is reflected on the exhibit are toll calls; is that correct?

[868] Q. And you don't know, I take it, where the information on Defendant's Exhibit F originated? A. I do not.

Q. But looking at that sheet, two sheets, all the calls reflected there are toll calls; is that correct? A. Yes, sir.

Mr. Christy: Your Honor, with regard to Defendant's Exhibits E and F, they are originals. Some time before the hearing is over may we have leave to substitute photostats?

The Court: Oh, yes.

By Mr. Christy:

Q. After you got the case from Agent Cordes, Cordes had very little contact with the case; is that correct? A. Yes, sir.

Q. And you talked to Cordes about the case only on very few occasions? A. Occasionally we discussed the case.

Q. And he never gave you any wiretapped information, did he? A. Not to my knowledge.

Q. And never indicated to you that he had gotten any wiretapped information from any source whatsoever?

Peter F. Geissler—for Defendant—Recalled—Cross

[869] A. He never discussed anything about wiretaps with me.

Q. Mr. Geissler, you have previously testified that your recollection is that in 1950 and 1951 and 1952 you made periodic requests to the post office to put a mail watch on Costello's mail? A. Yes, sir.

Q. And you received reports from the post office from time to time? A. Yes, sir.

Q. And you can't recall, can you, any report on a mail watch which directed you to any witness who testified in the trial, can you? A. I do not know who testified at the trial, Mr. Christy, I mean, when you are talking about a mail watch. If you could refresh my memory on that matter, I may be able to testify.

Q. You can't recall any at this point?

Mr. Williams: Your Honor, the witness has said he doesn't know who testified at the trial, so I think the question is objectionable. I object.

The Court: The answer won't be very enlightening, whether it is objectionable or otherwise.

Q. But I think you testified that when you got [870] these reports from the mail watch, many of the names which appeared on the reports were already familiar to you? A. I examined the proceeds of the mail watch, Mr. Christy, and in many instances the party had been contacted prior to the information being received by the mail watch and merely confirmed the fact that they had dealings with Mr. Costello.

Q. Is it your recollection that this is what occurred in most instances? A. Yes, sir.

Q. You were not aware, Mr. Geissler, that any conversation between Costello and George Wolf was ever intercepted? A. I am not aware of any interception of such conversation.

Q. Or Joseph Delaney—

Peter F. Geissler—for Defendant—Recalled—Redirect

The Court: Hasn't the witness told us, Mr. Christy, that he has no knowledge of any wire-tapped information; that he never asked for it, he never got it, nobody ever discussed it with him?

Mr. Christy: I wanted to ask him about these three names because they are specifically referred to in the motion papers, your Honor.

[871] The Court: All right. You may do so.

By Mr. Christy:

Q. Or with regard to Joseph Delaney? A. That's right.

Q. That is, you were not aware— A. I was not aware of any intercepted telephone conversation.

Q. Between Costello and Delaney? A. Between Mr. Costello and Joseph Delaney.

Q. Or between Costello and Leo Fennelly? A. I was not aware of any intercepted telephone conversation between Costello and Leo Fennelly.

[872] Mr. Christy: Would your Honor indulge me just a minute?

The Court: Yes, surely.

(Mr. Christy confers with associate.)

Mr. Christy: I have no further questions.

Redirect examination by Mr. Williams:

Q. Mr. Geissler, Mr. Christy asked you on cross-examination whether or not th re was a tax investigation of Mr. Costello prior to your entry into the case. I understand that your answer was that there was no active investigation? A. Yes.

Q. There was an investigation, was there not, Mr. Geissler? A. Yes, there was an investigation. There was what we refer to as a case jacket in the file. The file con-

tained newspaper clippings and certain memorandum. It appeared to be miscellaneous memorandum in the file, but apparently there was no active investigation.

Q. When you took over the case it became an intensive investigation, did it not? A. I would say it became a continuing investigation because I was involved in three or [873] four related investigations at the time, but it was more of a continuing process than an intensified process.

Q. Mr. Cordes had been working on the case for several years before you came into it, had he not? A. I don't know exactly the extent that Mr. Cordes worked on the case.

Q. But he had been working on a tax case against Costello before your entry into the case, is that not so? A. I understand he was assigned to the case. What he did with it, Mr. Williams, I do not know.

Q. Well, do you understand when he was assigned to the case? A. I do not know.

Q. He was assigned to make a tax investigation on Costello, was he not?

Mr. Christy: If the witness knows, your Honor.

The Court: Do you know? Do you know what Cordes' instructions were?

The Witness: I do not know what Mr. Cordes' instructions were, your Honor. I merely know that he was assigned to the case and he turned the case [874] over to me.

The Court: Did he give you any information or any papers other than what appeared in the jacket?

A. That is all he gave me, your Honor.

The Court: Very well.

By Mr. Williams:

Q. Now, when you came into the case, one of the first things you did was to put a mail watch on, is that cor-

rect? A. I don't know if I did it in the beginning or a few months after the case started.

Q. You were getting information at the start of the case from the mail watch?

Mr. Christy: I object to this. I think it has *been covered, your Honor.*

The Court: All right. Overruled.

Q. Isn't that so? A. One of the first things I did in the case, sir, Mr. Williams, was to go to the bank, the Corn Exchange Bank.

Q. I am asking you about the mail watch now, not about the bank trips. I say one of the first things you did was to put a mail watch on, isn't that so? [875] A. The mail watch was placed on the case I would say a few months after I entered it.

Q. You started getting information from the mail watch immediately, didn't you? A. Well, it takes them ten days to get the mail.

Q. Now at this time you started to run down the leads from the mail watch? A. That is right.

Q. And without your cards I understood you couldn't tell us what leads you got from the mail watch?

The Court: Well, we have been all over this, Mr. Williams.

Mr. Williams: Yes. That is all, your Honor.

Your Honor, I called this witness first so that I could accommodate him to get back to Albuquerque. He has been here for quite a while, and I want to excuse him today so he can go back.

I would like to call two witnesses before excusing him for a limited purpose, and I think I can then let him go today.

The Court: Very well. Will you stand by?

[876] The Witness: Yes.

The Court: Until the end of the afternoon.

The Witness: Do you want me to call Albuquerque?

The Court: Yes. That is Mr. Williams' request, and you said during noon hour you would communicate with your office. When you do that Mr. Williams may have some further questions.

The Witness: All right. I will put a call through.

The Court: Will you do that.

JOHN ROBERT MURPHY, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Mr. Murphy, where do you live, sir? A. 9 McLaren Court, Waldwick, New Jersey.

Mr. Williams: I think I made it clear for the record, your Honor, that I am calling him for the limited purpose of asking him—well, I am going to ask him concerning the jury list so I can excuse this other witness today.

Q. Now, Mr. Murphy, where are you employed? [877] A. Employed at the office of the Chief of Intelligence, Newark, New Jersey.

Q. Chief of Intelligence of the Bureau of Internal Revenue? A. Newark, New Jersey.

Q. How long have you been employed by the Bureau of Internal Revenue? A. December 1945 I gained employment with the Intelligence Division for assignment in New York where I remained until July 31, 1955 when I was transferred to Newark, New Jersey.

Q. So that in 1954 in March you were working in New York? A. That is right.

Q. Were you assigned to the tax case against the defendant here, Frank Costello? A. I was, from June 1952.

Q. And in March of 1954 you were assigned to that case? A. That is right.

Q. Mr. Murphy, did you direct Mr. Geissler to examine tax returns of certain persons in the upper and lower district of Manhattan and in Albany? A. I requested Mr. Geissler to visit these [878] districts, Lower Manhattan, Upper Manhattan and Albany for the purpose of inspecting the returns and obtaining certain information from the returns.

Q. And these were returns of prospective jurors in the Costello case which was then scheduled for trial, is that correct? A. They were members of the jury panel, I believe.

Q. And that was the jury panel from which the jury which was to try defendant Costello was to be picked, is that not so? A. That is true.

Q. Now, did you get orders from anyone directing you to follow this procedure? A. I did.

Q. From whom did you get those orders, sir? A. The United States Attorneys, Southern District of New York—the office of the United States Attorney for the Southern District of New York.

Q. When you say the office, whom do you mean? What person gave you the orders? A. Attorneys assigned to the Costello case.

Q. The attorneys assigned to the case gave you the orders to do this? [879] A. That is right, sir.

Q. And who were the attorneys assigned to the case? A. Specifically the attorney who requested me to obtain this information was Lloyd F. MacMahon.

Q. Now, when was it that Mr. MacMahon asked you to get this information? A. If I recall correctly it was in March of 1954.

Q. Now you say the attorneys assigned to the case asked you to get it. Were they all part of this request? A. I don't believe they were all part of the request.

Q. Was Mr. MacMahon alone when he asked you to get this information? A. Let me put it this way:

Mr. MacMahon was there. Who else was there, what other assistant attorneys were there I don't recall.

Q. But you remember that he as the chief prosecutor in this case specifically asked you to get the information? A. That is true.

[880] Q. Now, I don't know whether I have asked you yet what date it was, if you can fix it. A. Specifically the date?

Q. Yes. A. I can't specifically pick the date, Mr. Williams. The only thing I can say is that when the jury panel was made and was turned over to the United States Attorney it was shortly thereafter. As for the exact date I would not be able to give you the exact date.

Q. Well, do you recall, Mr. Murphy at this time when the trial in this case began? A. April 5, 1954.

Q. Now, with that date in mind are you able to fix with some degree of approximation how long before that date you were asked to do this job? A. I would say the latter part of March, 1954.

Q. By the latter part you mean some period from 15 March to 31 March? A. I would say so, yes.

Q. Now, would your diary show that, Mr. Murphy? A. My diary won't show specifically the date that Mr. MacMahon directed me to handle this situation.

[881] Q. Now, after Mr. MacMahon directed you to handle this situation did you make arrangements with the offices of the Upper and Lower District of Manhattan and with Albany to pull returns out of the prospective jurors in this case? A. Yes sir.

Q. Did you talk to the director in each of the districts? A. I don't recall specifically to whom I spoke in the districts.

Q. But whomever you spoke to in these districts, you gave the names of the jurors who could prospectively sit in this trial, is that correct? A. The names that were on that jury panel that were given to me. If they resided in the Upper Manhattan, the Lower Manhattan, or in Albany, where their place of residence was, I requested upon authority from the United States Attorney's office to see if there were—if there was a return on file for this individual.

Q. In other words, Mr. Murphy, you looked at the name and address of the prospective juror and from the address you made a determination as to where he should file his return, and you asked the director [882] in that district to pull his return preparatory to Mr. Geissler's visit? A. Right. Home address, Mr. Williams.

Q. Home address? A. Yes.

Q. Now, did you then direct Mr. Geissler to go to these districts and get information? A. I told him a day or so after I made my inquiry.

Q. Now, did you tell Mr. Geissler the purpose of his investigation of the returns? A. I never requested Mr. Geissler to make any investigation of the returns, Mr. Williams. I would like to make it clear that it was an inspection of the returns to obtain information from the returns.

Q. Well, I will avoid the use of technical language. I did not mean to suggest that you conducted a tax investigation of the persons whose names you had; I mean to suggest that you asked Mr. Geissler to look at the tax returns. If I use the term investigate I mean that.

You directed him to look at the tax return? A. That is true.

Q. Did you tell him the purpose of his inspection [883] of the tax returns? A. I don't recall whether I told him definitely the purpose. It might have been indicated to him, but whether or not I specifically said "You are going

up to check the jury panel or to check the returns of members of the jury panel," I don't recall that I might have said something as specific as that.

Q. What do you mean it might have been indicated to him? A. Well, for the purpose of my answer let me say that we had these names and from these names he could gather that all those names are available and that the jury panel is coming up, a jury panel—a jury is going to be picked from the jury panel, and it might have been indicated to him that it was the jury panel, and during the course of the conversation it might have been said that it was a jury panel.

Q. Didn't you tell him it was a jury panel in the Costello case? A. I don't recall specifically that I told him it was a jury panel in the Costello case or not, Mr. Williams.

Q. You didn't send him up there to inspect these returns without telling him the purpose of [884] inspecting them, did you?

The Court: Mr. Williams, this could go on for a long time. Let me ask a question here.

By the Court:

Q. You didn't keep it a secret from Mr. Geissler, did you? You didn't take any steps to make sure he didn't know that these were prospective jurors? A. No, sir.

Q. There wasn't anything like that? A. No.

The Court: Let us get along. The important thing is that they were pulled and they were looked at and certain information taken out. Let us get along.

By Mr. Williams:

Q. How many persons were there, Mr. Murphy, whose returns were pulled, to your knowledge? A. To my recol-

lection there was in the vicinity of the amount that Mr. Geissler testified, namely, 150.

Q. Were those persons' names given to you by Mr. MacMahon? A. Mr. MacMahon gave me the panel list.

Q. He gave you the names of the persons? A. That is right.

[885] Q. Did he himself give you those? A. If I recall correctly I believe he was the one who gave me the panel list.

Q. Now, did you get back from Mr. Geissler a report of his inspection? A. I got back from Mr. Geissler some sort of report on the returns that the representative of the District Director's office was able to locate.

Q. Now, how did that report come to you? In what form? A. Specifically I don't know how it came to me, but a report did come to me in longhand.

Q. It came in longhand? A. Yes.

Q. Did it come before the trial of the case? A. Before the trial?

Q. Yes. A. Yes, sir.

Q. And did you transcribe the longhand report into any other form? A. To my recollection I made notations from the longhand report of Mr. Geissler, yes.

Q. As a matter of fact, Mr. Murphy, you made a classification of the prospective jurors with respect [885-A] to their acceptability, did you not?

Mr. Christy: Objection, your Honor.

The Court: Sustained. You may ask him what he did.

[886] What did you do with respect to the report that you got from Mr. Geissler? A. To my recollection, I took the information that I received from Mr. Geissler, which was not complete in the sense that all the returns were not located for all the members of the panel—the panel was

close to 400 members, if I recall correctly—I took that information and I digested it on something—specifically, I don't recall—and from that information we turned the information over to Mr. McMahon.

Q. Did you make any kind of classification of jurors? A. Did I specifically—

Mr. Christy: Objection, your Honor.

The Court: Overruled.

A. Did I specifically classify jurors? No.

Q. I said did you make any kind of classification of jurors as A, B, C or D, or acceptable or unacceptable? A. Did I? No.

Q. Was that done?

Mr. Christy: Your Honor, I object to these questions as to whether any classification was made.

The Court: He asked Mr. Murphy if he did [887] it. Mr. Murphy said he did not. Now he asked if he knows whether anybody else did it.

Mr. Christy: I object to that question, your Honor, as to whether or not it was done.

The Court: Overruled.

A. I believe it was done.

Q. By whom was it done? A. I believe it was done under the direction of Mr. McMahon.

Q. By whom was it done? A. I don't know offhand. It wasn't me.

Q. You did not do it? A. That's right.

Q. But you believe it was done? A. That's right.

Q. What is the basis for your belief? A. Conversation.

Q. Conversation with whom, sir? A. United States Attorney's office.

Q. Who in the United States Attorney's office? A. The attorneys who were assigned to the case in 1954.

Q. Those were Mr. McMahon, Mr. Christy, Mr. Pierpoint and Mr. Seymour, were they not? [888] A. That's right. It might have been all or it might have been a few. I don't know. I don't recall.

Q. What was the conversation which was the basis for your belief, Mr. Murphy, that this was done? A. Specifically I don't recall.

Q. So it is your testimony, is it, that while you did not do it, and by "it" I mean classify the prospective jurors, your best recollection or your impression is that that was done? A. That's right.

Q. And is it your best recollection that it was done by a designation of class A, class B, class C, class D?

Mr. Christy: Your Honor, I object to this. I think it is completely irrelevant as to whether or not any classification was made.

The Court: Overruled.

Mr. Christy: Your Honor, let us assume for the minute—

The Court: Mr. Christy, if you think it is very important to argue this, you may do it out of the presence of the witness, but I have ruled. If you think it is important to have argument about it, I [889] will give you the opportunity but I will exclude from the courtroom every witness who may be examined concerning this question.

Do you desire me to do that?

Mr. Christy: Not at the moment, your Honor.

The Court: Very well.

Mr. Williams: Your Honor, I am going to call another witness who is present in the courtroom on this subject. I don't say this to be offensive to him, but I do say it to apprise the Court that I am and he is in the courtroom.

The Court: It is all right. I have ruled at the beginning of the hearing that certain persons,

namely, agents of the Internal Revenue or officials of the Internal Revenue—I am not quite sure of the hierarchy of titles and I don't want to offend anybody by declassifying them, and that is why I say officials of the department, but I ruled that those men might be present because they are assisting in the preparation of the case. But I think I know the basis of Mr. Christy's argument.

If he believes I do not know the basis of it, I just made the ruling I made before, but I will not [890] exclude any of these witnesses unless Mr. Christy desires to pursue the argument.

Do you?

Mr. Christy: I think I would like to make an argument, your Honor.

The Court: Very well. If there is any witness who is likely to be called—Mr. Murphy, will you withdraw to the witness room.

Who is the other agent?

Mr. Leath: Me.

(The witness and Mr. Leath left the courtroom.)

Mr. Christy: My argument is short, your Honor. I would object to any questioning along the lines of the classification or any further questioning along these lines at all. Assuming for the minute that we had this information and that a classification was made, I do not see that Mr. Williams can claim in any way that there was any bias on the jury, that the jury was partial, that Costello was denied a fair trial because of a partial jury. In other words, assuming these facts which have come out to be true, I do not see that there is any prejudice or could be any prejudice to the defendant Costello and therefore [891] I would argue, your Honor, that there is no purpose in pursuing this line of questioning.

The Court: Well, of course, I expect that that is going to be your argument at any time, Mr. Christy,

but the difficulty is that you are now urging me to exclude evidence which Mr. Williams thinks is relevant and material and the relevance and materiality of which seems quite clear to me.

I suppose that, if we are going to have any kind of a worthwhile decision on this question as to whether or not what was done was unfair to the defendant, the only way to do is to find out what happened, and that's the reason that I am allowing it in, and you have made your argument now.

I thought that was the basis of your argument. It has not persuaded me that my ruling is wrong. I adhere to it and we will continue to hear the testimony.

I don't mean to say that, if something else comes up, you are foreclosed from making an objection. There may be another basis on something that comes along. But as far as the general line of questioning is concerned, I am going to receive it.

Call back the witness. You may also bring [892] back Mr. Leath.

JOHN ROBERT MURPHY, resumed.

Mr. Williams: Will you read the last question.

(The reporter read the question as follows:

"Q. And is it your best recollection that it was done by a designation of class A, class B, class C, class D?") A. It was done by classification but not specifically the classification that you just mentioned, Mr. Williams.

Q. What specific classification was it done by, sir? A. I believe by numbers.

Q. It was done by 1, 2, 3, 4? A. That's right.

Q. Class 1 represented the most acceptable jurors to the Government?

Mr. Christy: Objection, your Honor.

The Court: Sustained. You may ask him if he knows what the basis of the different classifications was.

By Mr. Williams:

Q. Do you know what the designations meant?

[893] The Court: First of all, did you participate in the studies that, as far as you know, resulted in classification?

The Witness: I believe I was present, your Honor, but I wasn't—after all, the attorney was handling the situation.

The Court: Very well. The question is do you know and are you able to tell us what was the basis of the classifications?

The Witness: The lower the number, the most favorable the panel member.

By Mr. Williams:

Q. To whom? A. The Government.

Q. To the Government. And how many classifications were there? A. If my recollection serves me correctly, there were four.

Q. Would you tell us, Mr. Murphy, the criteria that were used in putting a given prospective juror into a given classification?

Mr. Christy: Objection, your Honor.

The Court: Overruled.

If you know.

[894] A. I don't think I can answer that, Mr. Williams. I don't just know how far you had to go to get in class 1, 2, 3 or 4.

Q. Can you tell us who made that determination? A. It was under the direction of Mr. McMahon. Mr. McMahon may have made it.

Q. Did Mr. McMahon tell someone to make the classification or did he make it himself? A. That I do not recall.

Q. You say, as I understand it, that you were present when this was done? A. I believe I was in the room when it was done, yes, sir.

Q. Who else was in the room? A. I don't recall specifically who was in the room.

Q. Give us your best recollection on it. A. There were two rooms, Mr. Williams. One was Mr. McMahon's room and there was a room off Mr. McMahon's room. The door was always open to both rooms. There were four Assistant U. S. Attorneys in the room, generally Mr. Leath and myself, and then periodically there were the revenue agent Albert Sohn and possibly others who came in for piecemeal work; but specifically [895] who was there, it is impossible for me to state. The only thing I can say is that there might have been—everybody might have been in the one room at the time it was being done but they might have been doing another kind of work.

Q. Who was doing this kind of work, Mr. Murphy? A. Mr. McMahon was the major person involved. Who else was in the situation, Mr. Williams, I do not recall; and I am speaking now of the jury panel.

Q. Mr. McMahon was in charge of this? A. Mr. McMahon was in charge of the entire case.

Q. He was in charge of the jury classification? A. Everything. Nothing was done without Mr. McMahon's approval.

Q. What I am trying to ascertain from you, Mr. Murphy, is whether or not he delegated this particular job to some person, the jury classification job about which we have been speaking? A. I do not recall.

Q. Do you have a recollection as to any persons who were present at the time the jury classification took place? A. I only can reiterate—

[896] The Court: Do you mean present in the group that was doing the studying?

Mr. Williams: Yes.

A. I can only reiterate what I said before, Mr. Williams. I don't know specifically what Assistant United States Attorneys took part in this part of the case, namely, the jury panel.

Q. That is not my question, Mr. Murphy. My question was do you recall the name of any person who was present in the group doing this work? Present, sir. A. No, sir.

Q. You do not? A. My recollection is all the individuals I mentioned a second or so ago, namely, the Assistant United States Attorneys, Mr. Leath, Mr. Sohn and myself were all there the major portion of the time.

I will say that it was one of the Assistant United States Attorneys—which one I don't know—who ran this entire jury panel thing. Mr. Sohn, Mr. Leath had no part in it whatsoever. Maybe that clarifies the situation or brings it down to a few individuals. I don't know, Mr. Williams.

Q. Then from the Bureau of Internal Revenue only you participated in this; is that correct? [897] A. I got my orders from Mr. McMahon and I complied and reported back to him.

Q. I understand. A. That's the answer.

Q. No one else from the Bureau was there present working on the classification except you? A. Mr. Leath, Mr. Sohn; the answer is no.

Q. They were not there? A. No, sir.

Q. Was there anyone else from the Bureau of Internal Revenue there working on this? A. No, sir.

Q. Only you? A. That is right.

Q. And the only person you can remember specifically who was there was Mr. McMahon? A. That is right.

Q. And had the classification been done before Mr. McMahon looked over the reports or did he do it? A. I believe

had a part in it or maybe the entire part in it. I don't recall. But no classification was done without one of the representatives of the United States Attorney's office handling it.

Q. How long did it take to do this [898] classification? A. I don't recall.

Q. You don't recall? A. No.

Q. Can you help us a little on that, sir, by an approximation? A. You mean by hours?

Q. Yes. If it was hours or if it was days, how long did it take? A. It wasn't a day.

Q. How long? A. A couple of hours, I surmise. I don't recall specifically.

Q. This all took place in 1954, didn't it? A. (Witness nods.)

Q. He doesn't get the nod of your head. A. I am sorry. Yes, sir.

Q. Were you working from some reports other than Geissler's or from Geissler's yellow sheets? A. There was other information there. The reports were not prepared solely from—the classification was not prepared solely from the information obtained from the income tax returns because we only received them in less than 50 per cent of the income tax [899] returns.

Q. I am going to ask you about that in a moment but at the moment that is not responsive to my question.

Were the reports on the jurors' income tax returns in yellow sheet form as prepared by Geissler or were they in some other form when you worked on them at the classification time? A. I don't recall.

Q. You don't recall that? A. I don't recall specifically what we worked from at that time.

Q. Geissler gave you his yellow sheets? A. Mr. Geissler gave me work papers. Specifically whether they were yellow or white I don't recall.

John Robert Murphy—for Defendant—Direct

Q. Did you change those work papers into a formal report? A. I don't recall whether I did or whether I used his report—his work papers.

Q. Your recollection is blank on that, is it?

The Court: He has said so about half a dozen times since he went on the stand. We just don't have enough time to keep after that.

[900] Q. Isn't it normal at the Bureau, Mr. Murphy—

The Court: Now, Mr. Williams, I direct you to leave that point. You keep coming back to it all the time and we could spend a great deal of time going into how efficient this man is and all that, but we just don't have enough time. There are other matters to be disposed of. Let's get to the point you think is important.

Mr. Williams: Yes, sir.

Q. Now, Mr. Murphy, I want to ask you this question: Since you were there present at the time of the classification, while you did not make the classification, do you know the criteria which were being employed in the making of the classification by Mr. McMahon? A. As I stated before, Mr. Williams, I don't know what placed them in the category of 1, 2, 3 or 4. I don't recall that. I furnished the information—whatever information I had available—to the Assistant United States Attorney who was handling the matter and he made the notations. I did not make the notations.

As for the criteria, I can't tell whether they were in classification 1 or 2 or what it made up [901] or how to get in classification 1 or 2.

Q. Now, you do know, do you not, Mr. Murphy, that the returns which were pulled and inspected were the re-

turns of those jurors who had a possibility to sit on this case, isn't that so? A. They were members of that jury panel, that's right.

Q. And those were the only members of that panel who could have possibly sat on this, the Costello case, isn't that so?

The Court: What do you mean by that?

By Mr. Williams:

Q. I mean you did not ignore the returns of jurors who prospectively could have sat in this case?

The Court: I will sustain the objection to that because I don't understand the question. The witness has said that he got a copy of the jury panel and that after that he communicated with the Internal Revenue offices in Lower Manhattan, uptown Manhattan and Albany, and that he asked the agents in charge there to pull certain returns if they had returns there for names that he gave them, and he gave the names according to the addresses.

Isn't that your testimony?

[902] The Witness: That is right, your Honor.

The Court: Do I understand by that that, if you had—whatever the number was—you gave all the names on the panel to the various offices and asked to have returns pulled?

The Witness: That's right, sir.

The Court: And as a result of that direction there came out something in the nature of 150 returns?

The Witness: I believe that is the estimated amount.

The Court: That is your estimate. That was the estimate Geissler gave and you said your recollection was about the same.

So your question now, Mr. Williams, is not quite in accord with the testimony as we have it up to now. But you may proceed.

By Mr. Williams:

Q. Mr. Murphy, is there a record, to your knowledge, at the director's office of Upper, Lower Manhattan or Albany as to whose returns were pulled for this purpose? A. I don't believe that they would have a record of whose returns were pulled.

[903] The Court: The question is do you know. A. I don't know.

Q. Do you have a record of those persons whose returns were pulled for this purpose? A. I don't have a record of what returns were pulled, no, sir.

Q. You don't have it? A. No, sir, I don't.

Q. Is there one in existence, to your knowledge? A. To my knowledge, we made a search yesterday—when I say "we," I am talking about Mr. Christy and myself—we made a search of the files in this office, namely, the United States Attorney's office, for any kind of work papers of Mr. Geissler or records in my handwriting or something of that sort. We found none. There is no record.

Mr. Leath made a search, as Mr. Leath reported to me this morning, of the files over in the Intelligence Division and he could find no record.

Q. Did you find or, to your knowledge, was there found any record whatsoever of any description on this subject matter of the inspection of the prospective jurors' returns in this case? A. I found no record in my handwriting or Mr. [904] Geissler's handwriting relative to any information taken from the income tax returns and this information was turned over to the United States Attorney.

Colloquy

Q. I didn't ask you about any record in your handwriting or Mr. Geissler's handwriting. I asked you, Mr. Murphy, about any record, any written record whatsoever, of any description, on the classification of the jurors in this case or on the inspection of their income tax returns. A. There is a copy of the jury panel available.

Q. Is there any notation on it, sir, with respect to the subject matter about which I am inquiring? A. There is a copy of the jury panel available with numbers on it: 1, 2, 3 and 4.

Q. Do you have that here in court? A. I don't have it, no, sir.

Q. Who has that, sir? A. It is the property of the United States Attorney.

Mr. Williams: Your Honor, I would like at this time most respectfully to move that the Court direct the United States Attorney to produce that list which has just been referred to by Mr. Murphy.

The Court: Do you desire to be heard?

[905] Mr. Christy: It is available, your Honor.

The Court: I say do you desire to be heard?

Mr. Christy: I object to the production of this jury panel which has numbers on it, as Mr. Murphy has indicated. It is the work product of the United States Attorney. I don't see that there is any basis on which Mr. Williams is entitled to look at it.

The Court: Do you have it here?

Mr. Christy: I do not. It is down in my office, your Honor.

The Court: Well, will you make it available to me?

Mr. Christy: Yes, I will, your Honor. I can go down and get it right now, if you wish.

The Court: Do that. Can you send somebody down?

Mr. Christy: Yes.

Mr. Williams: May we wait for that?

The Court: I was wondering if you could go ahead with something else.

Wait a minute now. The witness says he knows where it is.

We will recess now until 2:15.

[906] By the way, this afternoon we will have to recess at 4 rather than 4:30 because I have another hearing at 4 o'clock.

Mr. Christy: Your Honor, I now have a photostat of Court's Exhibit No. 1 and I would like to submit that to the clerk for sealing in the envelope as your Honor has directed.

The Court: That is the report of last January?

Mr. Christy: That is right, your Honor.

The Court: All right.

(Recess taken until 2:15 p.m.)

[907] AFTERNOON SESSION - 2:00 p.m.

(The following preceedings took place in the robing room):

Mr. Christy: I requested this conference, your Honor. I now have, your Honor, a list of the panel of jurors to which the witness Murphy alluded, and it does have notations on here and the classification numerically as the witness testified, but I would resist the production of this letter at this time. It is, first of all, the work product of the United States Attorney; that is, any of the notations on the list. They are the operation of the mind of the person that wrote it. We have no idea what went into the writing of the numbers and the classification here. There are, of course, many sources of information other than the tax returns from which the person who made this list could have classified the jurors, and I call your Honor's attention to the fact that to release this document would be considered extremely prejudicial. There are names of about 360 people on here. There are notations, and I think if it is

to come into the hands of anybody except the United States Attorney, [908] it might result in a considerable amount of embarrassment and prejudice to these people whose names appear on the list and I would resist the production of it.

The Court: Well, is there any reason why this can't be discussed out in the courtroom?

Mr. Christy: Well, I felt that this was something we should take up in chambers.

The Court: Oh, I don't see why we should do it that way. In any event, you are going to make it available to me.

Mr. Christy: Well, if your Honor so directs me, I will make it available to you.

The Court: Well, I do direct you to make it available to me.

All right, I will hear you, Mr. Williams.

Mr. Williams: Does your Honor want to do it in open court?

The Court: Oh, I don't know that there ought to be any mystery about it. Let us do it right outside.

(The following proceedings took place in the courtroom:)

The Court: Now, in the conference which was just concluded in chambers Mr. Christy has presented [909] to me a list of the panel of jurors that were called from which a jury was to be selected for the trial of the case of United States v. Costello, Indictment C-141-9, 1954, was it?

Mr. Christy: That is correct.

The Court: And Mr. Christy produced this pursuant to the Court's direction. The record should show that he believes that it is improper for the Court even to require the production of it to the Court and vigorously opposes the making of this available to Mr. Williams for a variety of reasons.

One is the reason that he stated earlier today when the question first came up, namely, that it was the work product

of the man who did it, the work product of the Assistant United States Attorney who did it, and that there is no way of fairly testing what factors that man took into consideration when he made the evaluation of the prospective jurors. He now makes a second objection which was not mentioned then and that is that the disclosure of this list and the indication of the classification that the Assistant United States Attorney put alongside the names of the prospective jurors would in his [910] opinion be possibly prejudicial and that it would be a highly improper disclosure in so far as it may be an embarrassment to an individual juror.

At that point when we were in the robing room the Court asked Mr. Williams if he had anything to say. He said that unless the Judge required him to say it in the robing room he would just as leave say it out in the open courtroom, a suggestion to which the Court has agreed, and now, Mr. Williams, you are on.

Mr Williams: Your Honor, at the outset I want to say that I have no desire—

The Court: By the way, I have fairly stated your position, have I not, Mr. Christy?

Mr. Christy: I think so, your Honor.

The Court: If you desire to add anything to that, you may.

Mr. Christy: No, I think you have summed it up, your Honor.

Mr. Williams: I want to say, your Honor, that I have no desire in the world to cause the potentiality of embarrassment to anyone whose name appears on that jury panel, but I think that the Court can take adequate safeguards to protect those persons [911] from any embarrassment from the disclosure of what classification the United States Attorney's office felt they should fall into with respect to their favorability to the Government in this case and at the same time safeguard this defendant's rights.

Your Honor, the testimony has been, as I understand it to date, that there is no record whatsoever presently extant either in the Bureau of Internal Revenue or the United States Attorney's office which shows the fact of the income tax returns having been pulled on the jury panel for April, 1954, there is no record which shows the findings of the man who pulled those income tax returns, Mr. Geissler, and apparently there is no record to show the classification of these persons by the Assistant United States Attorney who in fact did classify them save this one document which has been produced over the resistance of the United States Attorney's office.

The Court: By the way, before we go any further, will you take, Mr. Clerk, and mark this entire file Court's exhibit 2 for identification.

(Marked Court's Exhibit 2 for identification.)

[912] Mr. Christy: May we have the same ruling as to a substitution of a photostat?

The Court: You may have the photostat but I will keep the original record as a Court record, and I will do that with the original report of Mr. Geissler. At the present time you have the original and we have only the photostat.

Mr. Christy: Yes, sir. That is perfectly agreeable, your Honor.

The Court: Where is that envelope with Court's Exhibit 1?

(To Clerk) You just hold that and when we get finished with this matter I will give you the instructions I want you to follow with respect to that. Just keep the two there.

Mr. Williams: Your Honor, one of the things which has been testified to here both today and when this subject opened up was that 150 prospective jurors had their income tax returns pulled. As I now understand Mr. Christy's statement, the panel which he has provided the court with

is comprised of, I think he said, 360 persons. Now, from the testimony that has been given, your Honor, I must have a predicate for believing that more than 150 persons [913] were subjected to this inspection about which we have heard, and so I think for that reason, your Honor, the defense should see whether there was an attempt to inspect the income tax returns of the whole panel and how successful it was, whether it was more successful than 150 inspections would indicate, and then, of course, I think we are entitled to know what use was made of the inspection of the returns by the prosecution with respect to the selection of the jury and I think, if the Court please, that we can only ascertain that by having access to this record so that at the time when we learn who it was who actually made the classification of these jurors, we may ask him by confronting him with his classification what criteria were employed by him in making the classification which he made.

Now, I understand that Mr. Christy represents to the Court that in addition to the classification we are fortunate enough in this exhibit to have notations of things with respect to what coursed through the mind of the classifier. So it appears now that maybe after all there are some indicia of what the United States regarded as important in [914] making the classification of jurors 1, 2, 3 and 4 on the basis of favorability.

Your Honor, I respectfully urge that this goes to the heart of the matter, and I again say to your Honor that I want to state that it is the position of the defense, as it is the position of the Government, that any possibility of embarrassment to someone who served on that jury panel in 1954 should be obviated in so far as it can be and we, of course, don't ask for anything that could infringe in that area.

The Court: Except the making available of this list and every name on it to you for examination in a public hearing.

You see, Mr. Williams, that is what is troubling me.

Mr. Williams: And it troubles me, too, your Honor.

The Court: Mr. Christy was about to arise in the midst of your argument and maybe he has something further to say and I want to hear him.

Mr. Williams: Surely.

Mr. Christy: I was going to say with regard to the notes I do not believe there are notes on that [915] list. There are letters, the meaning of which I do not know. I think your Honor can determine that by a quick examination of the sheets.

The Court: Yes.

Mr. Christy: Further let me say that the classification which was apparently made is not based solely on any tax returns which may have been pulled. There are other criteria which were employed by the prosecutor in arriving at the designations or classification on that list.

Mr. Williams: Your Honor, I think that is a subject into which we should be permitted to inquire, because counsel—

The Court: You have not attempted that yet. You have not been refused an opportunity to inquire into that. I suppose that at the proper time you will call whomever you think may throw light on that subject.

Mr. Williams: Mr. Christy says that other criteria were used. Of course, I don't know what Mr. Christy's information is on that. He did not know as of three days ago that the income tax returns were used. So I don't know what his information is on this, your Honor. I do want the opportunity, [916] if the Court will give it to me, to ascertain from appropriate witnesses what criteria were used, and my suggestion—

The Court: I know, but what information you are going to secure from witnesses is really not before me at the present time. All that is before me now is whether I should make available to you a list of names of persons,

some of whom had their income tax returns looked at in the way the witness described.

Mr. Williams: Would your Honor like to pass disposition of this question until I have pursued interrogation of other witnesses absent that document?

The Court: You may do it in whatever order you want, because my problem now is to secure as much as possible the persons whose names appear on here from any embarrassment that might arise from disclosure here, and I don't think that that is going unduly to restrict you in pursuing the line of questions that you want.

Mr. Williams: I have one suggestion.

The Court: I suppose that the list of those who actually served as jurors is available. I don't [917] know whether I have my own notes that I took during that trial yet. I haven't looked for them. I would doubt that I would have anything in my notes with respect to the names of the persons who served as jurors because I don't customarily. In fact, I can recall no case that I sat in as a judge where I ever made any such record. I always assumed that there were other records available from which that information could be secured later if it were required. I don't know whether I have it, but I take it that the names of the jurors who actually sat will be there.

Now, whether or not a transcript of the proceedings at the time the jury was being drawn reflects the various jurors who were excused and what their names were, I don't know.

I see Mr. Shilensky nodding his head.

Mr. Shilensky: I think it does, your Honor. I think it does reflect the panel called and the jurors examined and those rejected.

The Court: It may.

Mr. Christy: It does, your Honor.

The Court: Does it give the names of the jurors?

[918] Mr. Christy: The voir dire examination was reported.

The Court: Does it indicate the name of the juror?

Mr. Christy: Yes, your Honor.

Mr. Williams: Your Honor, I was about to make a suggestion and I frankly don't know how helpful it will be because I am not familiar enough with the mechanics of putting together a list of that character, but I at least have this one suggestion to make to the Court, that it might be possible for us to allude to that list by numbers instead of name and thereby obviate the possibility of embarrassing any persons who did serve on that panel.

Now, of course, on the other hand, if the numbers can be readily tied to names through some other office, that won't suffice. I realize that. However, it seems to me some mechanical device—

The Court: Here is the problem as I see it from my standpoint, Mr. Williams: There is a list here, I am told, of 350 or 360 names. I don't know how many alternates sat in that case—

Mr. Christy: Three.

The Court: You have a jury of twelve and [919] three alternates. So you have fifteen persons who actually sat, of whom twelve were the jury that passed on the question of the defendant's guilt.

Now, whether or not any of those jurors who actually sat were influenced in any way is one part of the question.

Another part of the question is whether any of those who were excused by the Government after the defense had indicated, if it had, that those jurors were acceptable, whether or not the excusing by the Government prevented the defendant from getting a juror that he would like to have sat on his case is another question; but, in any event, it cannot involve a great number of people because it is perfectly clear that not all of the 360 people whose names

were on the list and therefore in the drum were called. The record will show that of the total of these people only X number were actually called.

[920] Now I certainly think it would be improper and my present notion is to allow no inquiry whatsoever that might reveal the names of any of the persons whose names were never called. I see no reason in the world why that should occur here because if a person was not called I don't know what basis you would have for claiming that the defendant was thereby deprived of some right, because that person, not called, may have been one of 150 whose income tax return was looked at by the agents.

Mr. Williams: I think, your Honor, we can go forward this afternoon with our inquiry without arriving at the manner of disposing of this question. I don't think it need hold up—

The Court: No, I do not intend to make any definitive ruling on it now except to say to you, except to make this ruling: That unless something new develops which up to now hasn't which makes it imperative in order to protect the defendant's rights, I shall not permit any disclosure of any of the names that appear on this list, and we will work out some other way to allow you the fullest freedom and inquiry into the practice by which this was arrived at and what results you think it produced.

[921] Mr. Williams: Yes, sir.

Now, Mr. Murphy was still on examination.

The Court: Well, we will get him back.

Mr. Williams: Before he comes in, your Honor, I don't want to infringe on your Honor's ruling, and I understand it.

The Court: Yes?

Mr. Williams: I would like to ask him, your Honor, that having seen this—

The Court: Well, ask him any question you want.

John Robert Murphy—for Defendant—Direct

JOHN ROBERT MURPHY, resumed.

Direct examination continued by Mr. Williams:

Q. Have you seen, Mr. Murphy, over the noon recess the record which you referred to this morning on which the jurors were classified? A. Over the noon recess?

Q. Yes. A. No, sir.

Q. Well, have you seen it recently? A. Yes, sir.

Q. Do you know how many jurors were on that list?

[922] The Court: How many names? Why don't you call them names.

Mr. Williams: Yes.

The Court: Unless you are trying to find out—

Mr. Williams: I am not trying to find out the identities, your Honor.

The Court: Oh, I know you are not trying to find out the names, but there weren't 360 jurors that tried the case. That is my point, and you are referring to jurors. These were only prospective jurors. Some of them turned out to be actual jurors.

By Mr. Williams:

Q. Do you know how many names were on the list that you described for us this morning? A. I believe it was yesterday, Mr. Williams, I went through the list and I counted the pages, and I counted the number of names on one page and I think it came to the vicinity of 350. Now I wouldn't want to be held to it. I didn't count them right down the line.

By the Court:

Q. Mr. Murphy, will you look at this yellow file [923] jacket which has now been marked Court's Exhibit 2 for identification? A. Yes, sir.

John Robert Murphy—for Defendant—Direct

Q. Will you look through it and tell us whether or not that is the same list that you say you recently saw? A. This is, your Honor.

Q. Very well. And that is the list that you counted in the manner that you just described? A. Yes, sir.

Q. In other words, you estimated that there were about 350 names? A. Yes, sir.

By Mr. Williams:

Q. Well, was there a classification of each of those jurors? A. I believe so. Now—I believe so.

Mr. Christy: Is that so of the names on the panel?

The Court: Now, Mr. Williams, I will go through each page. Alongside of each name appearing on the list which now constitutes Court's Exhibit 2 for identification there appears in ink a numeral and in some instances as well as a numeral a letter.

[924] *By Mr. Williams:*

Q. Now, Mr. Murphy, is that the list which Mr. McMahon turned over to you prior to the inspection of the returns? A. I wouldn't know, Mr. Williams, if that was the list he turned over to me but it was a copy of the jury panel. I don't know whether that was specifically the one or not.

Q. Well, does that refresh your recollection that you inspected more than 150 returns or had more than 150 returns inspected? A. My recollection, Mr. Williams—we attempted to locate the returns for each individual set forth in that jury panel but we were not successful.

Q. Well, is your recollection refreshed now that you were successful in locating the returns for more than 150? A. Oh, no. I don't think that we located the returns for more than 150.

John Robert Murphy—for Defendant—Cross

Q. But you attempted to locate the returns for each of the jurors on that panel which Mr. MacMahon turned over to you? A. We attempted to locate the returns for each and every member of that jury panel, yes.

[925] Q. Now, each of the jurors on that list as far as you know lived in the Upper Manhattan District, Lower Manhattan District or the Albany District? A. They lived—it was in the jurisdiction of the Southern District of New York, which entails those three districts.

Q. And when you sent the names of the persons whose returns you wanted to have pulled by the collector in the Upper District and the Lower District of Manhattan or Albany, you sent in all of the names on that panel that fell within his particular district, did you not? A. The residents that fell within his particular district, that is right.

Q. And they all resided in one of those three collection districts, is that right? A. That is right.

Q. Now, has your recollection been refreshed at all, Mr. Murphy, since you testified this morning concerning who actually participated in the classification? A. No, sir.

Mr. Williams: It has not? You may examine.

[926] *Cross-examination by Mr. Christy:*

Q. Mr. Murphy, you requested Mr. Geissler to inspect these returns and get you certain information, is that correct? A. That is correct.

Q. And he gave you certain sheets of paper with some information on it, didn't he? A. Certain sheets of paper. What they looked like, Mr. Christy, I don't recall.

Q. And your best recollection is that there were only about 150 names out of the panel on whom there was any inquiry? A. To my best recollection.

Q. So far as you know, Mr. Murphy, Mr. Geissler never conducted any examination on any of those returns? A. To my recollection—

Q. To your knowledge. A. To my recollection he never did.

Q. And to your knowledge Mr. Geissler never talked to any of the persons whose returns had been pulled?

Mr. Williams: Your Honor, I don't think that that is proper cross-examination. These things were all conceded on direct. I don't think that they [927] are—

The Court: Well, I will allow it.

(Question read.)

The Witness: He never spoke to any of them, to my recollection.

Q. He didn't give any returns to you or bring any returns to you, actual income tax returns? A. He was instructed just to take information from the returns.

The Court: No, but the point is, he didn't actually bring back to you the returns and say "Here is the return of Mr. X or Mr. Y"?

A. I never saw any of the returns.

The Court: Well, he didn't bring them?

The Witness: No; that is right.

Q. And he didn't give them to anybody in the United States Attorney's office? A. My recollection is he didn't give them to anybody.

Q. And you never talked to or interviewed any of the persons whose returns had been pulled, did you? A. No, sir.

Q. And to your knowledge no person in the Treasury Department ever talked to or interviewed any [928] of these persons whose returns had been pulled? A. To my knowledge they did not.

By the Court:

Q. Well, all you mean by that is as far as you know they did not? A. Yes.

Q. You don't mean to say that you know that they did not? A. No.

Q. What you mean to say is you don't know? A. I don't know.

Q. You never heard that they did? A. That is right, your Honor.

Mr. Christy: No further questions, your Honor.
The Court: All right.
Mr. Williams: I have no further questions.

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[929] LLOYD F. MACMAHON, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. MacMahon? A. I live in White Plains.

Q. What is your address? A. 9 Ogden Avenue.

Q. How long have you resided there? A. I believe since 1951. I am not absolutely sure.

Q. What is your occupation? A. I am a lawyer.

Q. How long have you been a lawyer? A. Since 1939.

Q. You are a member of the New York Bar, are you, Mr. MacMahon? A. Yes.

Q. Was there a time when you were an Assistant United States Attorney in the office of the United States Attorney for the Southern District of New York? A. Yes.

Q. When was that? [930] A. From April 1953 until I believe June of 1955 when I became United States Attorney

by Court appointment and served until that following September.

Q. That was in 1955, was it? A. That is right.

Q. And thereafter you left the United States Attorney's office? A. That is right.

Q. Mr. MacMahon, while you were an Assistant United States Attorney did you prosecute an income tax case captioned United States v. Frank Costello? A. Yes.

Q. And did that trial begin in April of 1954, Mr. MacMahon? A. Yes.

Q. Prior to that time did you give any instructions or orders or make any requests of anyone to secure the income tax returns of prospective jurors? A. Whether I gave such instructions or not I don't recall. It was done and certainly I knew it.

Q. Do you recall to whom the instructions were given? A. I say I don't remember who gave the [931] instructions but it may have been me; I don't know.

Q. What? A. I may have. I couldn't be sure.

Q. You have no recollection on that? A. No positive recollection.

Q. Did you in fact receive any instructions or requests or orders to have this done from your superiors? A. I don't recall any such instructions.

Q. Well, if it was done, Mr. MacMahon, was it your decision to do it? A. I believe it was.

Q. It was not the decision of one of your assistants in the case? A. I don't believe so.

Q. Now, was your request to inspect the returns of all prospective jurors for the month of April, 1954? A. Yes.

Q. Do you know who physically did that job? A. I don't.

Q. Did you receive a report from the Bureau of Internal Revenue on the returns of those jurors? A. I received reports from agents, yes.

Q. From which agent, do you recall? [932] A. I think it was Agents Leath and Murphy, to my recollection.

Q. Now, did you receive reports, Mr. MacMahon, on all of the members of the panel? A. I couldn't be sure of that. I think so. Some of them had not filed returns as I remember.

Q. On everyone who filed a return however you received a report, is that right? A. I think so, yes.

Q. Now, can you tell us in point of time when it was that you received those returns in relationship to the start of the trial?

Mr. Christy: He didn't receive any returns.
Mr. Williams: I am sorry—reports.

A. Well, it was before the trial but I couldn't tell you how much before.

Q. Now, on the basis of those reports did you or any of your associates in the case make a classification of the members of the jury panel? A. I am afraid I don't quite understand what you mean by that question.

Q. Well, I will try to make it more specific.

Did you at any time make a classification of the members of the jury panel into classes known [933] as 1, 2, 3 and 4? A. I couldn't be sure. I think we did. I am not absolutely certain about it.

Q. Well, do you have a recollection, Mr. MacMahon, as to whether you did it or one of your associates? A. I have no independent recollection. My recollection is that we certainly discussed it and formed opinions about prospective members of the panel, of the jury—of the panel.

Q. And this was on the basis of the reports which you got from Mr. Leath and Mr. Murphy? A. Among a great many other factors.

Q. Now, what sort of reports did you get on the jurors from Mr. Leath and Mr. Murphy? A. Well, the only re-

ports I recall there was—the main thing I was interested in is whether any of these prospective jurors have had their own income tax trouble, and that is the main report I got from them.

Q. Well, did you get a report from them as to the income amount of the jurors? A. Not as such, although the subject was mentioned.

Q. Well, how was the subject mentioned, Mr. MacMahon? [934] A. Well, as I recall it they had certain information about them and they read it off, and that was—what we did with it after we got it I don't know, except that we did form judgments then and there and opinions on whether we would like that fellow on the jury.

Q. Who was present, Mr. MacMahon, at this particular conference on which these opinions were formed? A. I couldn't be sure.

Q. Do you recall that Mr. Leath and Mr. Murphy were there? A. I am not absolutely certain that both were there. No. I think so.

Q. Were any of your associates there? A. That I am not sure.

Q. Do you recall who was with you on the trial of the case? A. Yes.

Q. Who were they? A. Well, Mr. Christy, Mr. Pierpont and Mr. Seymour.

Q. Did any of them participate in the decisions that were made with respect to the jurors? [935] A. I have no positive recollection one way or the other on it.

Q. You have no recollection?

Now, were you furnished with any facts concerning deductions that the prospective jurors took? A. I have no positive recollection on that. I don't think so. My recollection is that we were not. But I couldn't be sure.

Q. Do you know whether any records were kept showing the basis for the classification that you made of the jurors? A. I don't think so. I don't recall.

Q. Do you remember that you classified the jurors 1, 2, 3 and 4? A. I testified before that I wasn't sure of that.

Q. Well, do you remember that you classified the jurors into four divisions? A. I have no recollection other than forming opinions about the prospective jurors. That is the only detail I can remember, unless you have something to refresh my recollection.

Mr. Williams: Your Honor, I wonder if it might be appropriate to show Mr. MacMahon the panel.

The Court: Let the record show that Mr. [936] MacMahon is now handed the jacket marked Court's Exhibit 2 for identification.

The Witness: (After looking through papers) Yes.

Q. Does that refresh your recollection on that subject, Mr. MacMahon? A. It does not but there certainly appear to be marks there.

Q. In whose handwriting is that, do you know? A. I don't.

Q. Is it yours? A. I don't think so. It may be.

Q. Mr. MacMahon, are there some notes next to those names there? A. I don't know whether that is my handwriting or not.

Q. You don't know your handwriting, Mr. MacMahon? A. I don't, not from this. If there were more of it here maybe I could.

Q. How extensive are the notes? How many words appear there?

Mr. MacMahon, I don't want you to read them to me, please; just tell me how extensive the notes are. [937] A. I see something here. That is my handwriting.

The Court: What page?

The Witness: Page—it seems to be 18, your Honor, but it is not very legible. The notation bar-

tender is in my handwriting. I can't tell whether it is page 18 or—

The Court: Well, all of these pages bear a number, 18 with a line under the figures, with a period after the 8, but for the purpose for identification here, it will be the first, second, third, fourth, fifth—the sixth sheet as now fastened in the exhibit, and the name where this word bartender appears is the fourth name on that list, and I will now put a check in red pencil just above it, being the item that Mr. MacMahon has just referred to.

Q. Well, that is the only item on these sheets which you can identify at this time? A. I didn't say that. I will have to look at them very thoroughly if you want me to be sure.

Q. Well, the point of my question, Mr. MacMahon, is whether you can make a determination as to whether you made the classification and the notes on those sheets or not? [938] A. I can't be sure. I can't be sure.

The Court: Well, of course, he can't be sure until he looks at it. He said that appeared to be his handwriting on that one. Let him look through the others.

Mr. Christy: Your Honor, may the witness be cautioned against revealing what is written either in his handwriting or somebody else's handwriting or what name appears?

The Court: I think that is advisable in view of the prior ruling that I have made.

Mr. MacMahon, if you will just indicate, if you see anything there in your handwriting, if you will indicate that the fourth name on the fifth or tenth page, whatever it is, is the item you are referring to, I will mark it.

The Witness: All right, your Honor.

The Court: Now, when I went through here before I advised Mr. Williams that there appeared here numerals after each name and in some instances the numeral was accompanied by a letter. I now see at least on one page here, on the first page, the last name on the first page what appears to be a pencil notation and it consists of three letters, [939] and I see on subsequent pages that those same three letters appear after some of the names.

Now, when you are going through it you might tell us if you know whether you put them there.

Mr. Christy: May I also request that there be no reference to the page number and the number of lines down the page where the name appears? I understand that this list was published, and if there is an indication as to where it appears in the list, it can be checked. If your Honor wishes to put a red check mark on the page—

The Court: I think that precaution is quite desirable. So hereafter if you will take a red pencil and you mark where it is without disclosing what page or what line of the page is involved. Do you understand, Mr. MacMahon? Wherever you see a notation that you recognize as something you put on there, you will put a red check on it.

[940] Q. Is it indicated on there, Mr. McMahon, if you found no return for the prospective juror? A. I couldn't tell you.

Q. Didn't you just look through it? A. Yes.

Q. But you don't know— A. I don't see anything on here of that nature.

Q. Have you checked all of those places where your handwriting appears? A. Yes.

Q. Is there handwriting other than yours on there? A. I think so.

Q. Do you recognize it? A. No.

Q. You do not? A. (Witness shakes head in the negative.)

Q. At the time the classification was made, you recall, I take it, that either Mr. Murphy or Mr. Leath or both were present with you? A. No, I am not so sure of that.

Q. You are not so sure of that? A. No.

Q. You recall that you had the reports on the [941] returns when you made the classification; is that right? A. I had the information that they had given me.

Q. On the returns— A. No. I had the information they had given me.

Q. I hadn't finished the question, Mr. McMahon. You had the reports with which Mr. Leath and Mr. Murphy had furnished you from the inspection of the returns of those names on that list, did you not? A. I had the benefit of the oral reports they had made to me on the panel.

Q. Do I understand they made only oral reports to you, Mr. McMahon? A. Yes.

Q. And you remembered; did you, the oral reports that they made to you when you went through that list? A. I had a good many other factors in mind.

Q. That is not what I asked you.

Mr. Williams: I am going to ask you, your Honor, if you will direct him to answer the question I asked.

Mr. Christy: He was about to answer. Let him finish the answer, your Honor.

[942] The Court: Go ahead.

The Witness: Would you read the question back.

(Question read.)

A. The time sequence on it is something I can't be sure of. Whether we made this classification then and there or whether we made it a day later, I don't know. I can't

recall. All I can tell you is that whatever information they had given to me was considered along with a good many other factors in arriving at this classification.

Q. Did you have that information in written form when the classification was made? A. At the precise moment that the numbers were put on here, is that what you mean, Mr. Williams?

Q. Yes, sir. A. I couldn't be sure.

Q. You couldn't be sure. Well, now, you did not carry in your mind all the oral information they had given to you on all the names that appeared on that list, did you, Mr. McMahon? A. Given to me from what source?

Q. From Mr. Leath and Mr. Murphy. A. I carried it in my mind long enough to make [943] this notation. Whether it was the next day or that night, I don't recall.

Q. Could it have been simultaneously? A. It could have been.

Q. Could have been. Is your recollection now refreshed that what information they gave to you was given to you simultaneously when you made the classification? A. No, it is not.

Q. It is not refreshed? A. (Witness shakes head in the negative.)

Q. As far as your recollection goes now, it could have been that they gave you the information that they had gotten as a result of the inspection of the returns of this panel and you made—carried it in your mind until the next day when the classification was made? A. It could be either way. I am not sure. I don't know when the classification was made, Mr. Williams.

Q. But it could have been that you carried it in your mind—

The Court: Yes, he has said that two or three times, Mr. Williams.

By Mr. Williams:

Q. And do you recall, Mr. McMahon, ever seeing [944] any written material regarding the returns of the names that appear on that panel? A. No, I have no recollection.

Q. You don't? A. My recollection is that I did not.

Q. You did not see any written material? A. (Witness nods.)

Q. Mr. McMahon, when you were examining the jury on the voir dire in this case, and when you were exercising your strikes, did you have that list available to you? A. I believe so. It looks like the list.

Q. Was it concealed from anyone working in this case?

Mr. Christy: Objection, your Honor.

The Court: I can't rule on it because I don't know what it means. There were a lot of people working on the case. The judge, for instance, was one of those working on the case, and the clerk and the bailiffs and several marshals.

Mr. Williams: I hadn't finished the question before the objection came, your Honor.

The Court: Oh, come, Mr. Williams. Withdraw the question, then, and precisely form the question [945] you want.

By Mr. Williams:

Q. Was it concealed from anyone working on this case on your staff that income tax returns had been inspected with respect to classifying these jurors?

The Court: You need not answer that question, Mr. McMahon.

Mr. McMahon is under no obligation to disclose how he dealt with an associate.

Mr. Williams: Your Honor, the question was asked—

The Court: I have ruled on it now. You can inquire as to what use was made of it, but whether the man trying the case concealed things from his associates is wholly beyond the point of any proper line of questioning here.

Mr. Williams: You may examine.

Cross-examination by Mr. Christy:

Q. Mr. McMahon, actually during the time you were prosecuting these cases you were the chief assistant, were you not? A. Yes, Mr. Christy.

Q. Mr. McMahon, you never saw any of the returns of members of the panel which were pulled, did you? [946] A. I have no recollection of ever having seen them.

Q. And you never talked to any of the persons on the panel whose returns had been pulled? A. Definitely not.

Q. Prior to the time of trial? A. That's right.

Q. And you never instructed any agent or any of your assistants to talk to any of the persons on the panel whose returns had been pulled prior to trial? A. No, I am positive of that.

Mr. Christy: I have no further questions, your Honor.

The Court: Mr. Williams?

Mr. Williams: I have no questions.

The Court: May I have the exhibit?

(Handed to Court.)

(Witness excused.)

Mr. Williams: Call Mr. Seymour, please.

Whitney North Seymour, Jr.—for Defendant—Direct

WHITNEY NORTH SEYMOUR, JR., called as a witness by defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you reside, Mr. Seymour? [947] A. 290 West 4th Street in Manhattan.

Q. How long have you lived there, sir. A. A little over a year.

Q. What is your occupation? A. I am an attorney.

Q. How long have you been so engaged? A. Just short of seven years.

Q. Are you a member of the bar of this court, sir? A. I am.

Q. Was there a time when you were engaged as an Assistant United States Attorney? A. There was.

Q. When was that? A. From April 2, 1953, into July of 1956. I think it was July 20.

Q. And was that in the office of the United States Attorney for the Southern District of New York? A. It was.

Q. During that period, Mr. Seymour, did you work on the prosecution of a case captioned United States against Frank Costello? A. I did.

Q. That was an income tax case, was it? [948] A. Yes, it was.

Q. Is that the case that was tried in April of 1954? A. It is.

Q. And was someone directly superior to you in the prosecution of that case? A. There was.

Q. Who was that? A. Mr. McMahon.

Q. Mr. Seymour, at any time do you recall instructions being given to agents of the Bureau of Internal Revenue to inspect the tax returns of prospective jurors in that case? A. No, sir.

Q. At any time do you recall that reports were furnished concerning income tax returns of prospective jurors?

A. I am not sure I understand what you mean by "concerning income tax returns," Mr. Williams. In any way relating to them?

Q. Yes. A. Yes, I do recall in a general way such reports.

Q. What do you recall on that subject? [949] A. I recall as a fact that some information came into the possession of our office relating to information that the Internal Revenue Service had about certain of the prospective jurors.

Q. Do you recall a classification of the prospective jury panel having been made? A. In the most general way I do recall it, yes. I have no specific recollection about it.

Q. Were you present at the time that the classification was made? A. I am not sure. I am not sure. I certainly knew of its existence and whether it was done in my actual presence or not I just can't recall.

Mr. Williams: I wonder if your Honor would show the witness the exhibit, Court's Exhibit 2, to refresh his recollection.

The Court: Yes.

Let the record show that the Court is now handing the witness the jacket and enclosure marked Court's Exhibit 2 for identification.

The Witness: Yes, sir.

The Court: Mr. Seymour, before you do anything more than look at it, I wish to give you this admonition: If during the examination by Mr. Williams [950] or later cross examination, if there be any, by Mr. Christy an answer to the question would require you to refer to any name on any of these pages, please do not mention the name, please do not state the page on which it appears, please do not state the line on the page on which it appears. If that moment comes there will be here available

for you a blue pencil or a red pencil—I don't know whether Mr. McMahon did it with the red one—

Mr. Christy: Mr. McMahon used the red one.

The Court: There is a blue pencil—indicate alongside the name with that blue pencil the name to which you are referring.

The Witness: I get you.

The Court: I have ruled that there shall be no disclosure of any of the names on there and I am taking these precautions in order to prevent that.

By Mr. Williams:

Q. Is your recollection refreshed, Mr. Seymour, that there was a classification of prospective jurors? A. Yes.

Q. And they were classified 1, 2, 3 or 4? A. If you will bear with me, I don't find any 4s. [951] (Witness refers to document.) I don't find any 4s, Mr. Williams. Possibly there are some here and in my haste I passed it over, but there certainly are 1s, 2s and 3s.

Q. Now, do you recall being at a meeting at which the classification was made? A. Specifically, no. By that I do not mean to say that I recall I was not present at such a meeting. I mean to say I have no recollection.

Q. Your recollection is blank on that subject; is that correct? A. Yes. I do have a general recollection that there was some classification of jurors. Whether I participated in it or not I do not know.

Q. And I take it your recollection in a general way is that information was supplied to you concerning income tax returns of the jurors; is that correct? A. Let it be understood that as far as I recall no information was supplied to me directly. Any information I may have came about because I was present at a time such information was discussed, and my information—again my recollection is not tied to specific income tax returns but only information relating to—necessarily relating to income tax returns be-

cause [952] it came from the Internal Revenue Service. That is to say I don't recall information from any specific return or the fact that any information came just from returns.

Q. Do you recall, Mr. Seymour, that information did come relating to returns of prospective jurors from the Internal Revenue Service? A. Returns as such I have no recollection, Mr. Williams.

Q. When you say "returns as such," I am not sure I understand what your answers means. A. Well, my recollection, which is admittedly vague on this, is that our office received some information from the Internal Revenue Service relating to certain jurors, which I do not know, as to whether they had themselves had any tax difficulties or disputes with the Treasury Department, and that is the fact that sticks in my mind. Beyond that I have no detailed recollection.

Q. And you did not participate in this classification of the jurors yourself? A. If I did, I have no recollection about it, but, again, I say that I won't say that I did not.

Mr. Williams: That is all.

[953] *Cross-examination by Mr. Christy:*

Q. Mr. Seymour, prior to the trial you never saw any of the tax returns of any person on the panel, did you? A. Certainly not.

Q. And prior to the trial you never talked to or interviewed any person on the panel? A. Oh, absolutely not.

Mr. Christy: No further questions, your Honor.
The Court: Mr. Williams?
Mr. Williams: No further questions.
The Court: You are excused.
(Witness excused.)
Mr. Williams: Mr. Pierpoint.

Powell Pierpoint—for Defendant—Direct

Powell Pierpoint, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Pierpoint? A. New York City.

Q. What is your address, please? A. 155 East 72nd Street.

Q. How long have you lived there? [954] A. Since 1953.

Q. You are a member of the bar of this court, are you? A. I am.

Q. How long have you been engaged as a lawyer? A. Since 1948.

Q. Mr. Pierpoint, was there a time when you were employed as an Assistant United States Attorney in the Southern District of New York? A. There was.

Q. When was that? A. 1953 to 1955.

Q. During your time as an Assistant United States Attorney, did you participate in the prosecution styled United States against Frank Costello, a tax case? A. I did.

Q. Do you recall in what year that was? A. I believe the trial was in 1954.

Q. Mr. Pierpoint, do you recall a request being made from your office to the Bureau of Internal Revenue to inspect the income tax returns of the prospective jurors in that case? A. Well, I don't recall the specific request, but I know such a request was made.

[955] Q. Do you know who made that request? A. As to the specific person, I couldn't be sure. It might even have been myself, but I doubt it.

Q. Do you know specifically to whom it was made, sir? A. No, I do not.

Q. Do you know what the request was? A. In detail, no.

Q. Do you know that it was to inspect the income tax returns of the persons on the April panel in 1954? A. Yes.

Q. You recall that? A. Yes.

Q. Do you recall, Mr. Pierpoint, receiving a report back from the Bureau of Internal Revenue regarding this inspection before trial? A. I don't recall—I recall that such a report was made. It didn't come to me personally but I do recall that such a report was made.

Q. Do you know to whom it was made? A. I really can't recall.

Q. Do you recall the point in time, Mr. Pierpoint, when that was made prior to trial? A. Well, I would say—and I suppose this is [956] my recollection—that it was fairly shortly before the commencement of the trial.

Q. Now, do you recall a conference at which the prospective jurors or the members of the jury panel for that month were classified? A. I don't know whether I recall such a conference or not. I do have a recollection that they were classified but whether I was in the conference that did it or not I can't recall.

Q. Do you recall the designation of the classes of jurors? A. No.

Q. Does it refresh your recollection they were classified 1, 2, 3 and 4? A. No, it doesn't refresh my recollection.

Q. It doesn't.

Do you recall that they were classified with respect to favorability to the Government's position? A. No, I certainly don't recall that.

Mr. Williams: Would your Honor show the witness, please—

The Court: Let the record show the Court is handing Mr. Pierpoint Court's Exhibit 2 for identification.

[957] Mr. Pierpoint, I will give you the admonition I have given the other witnesses. If during the

examination or cross examination it should be necessary for you to indicate anything with respect to any name on any of the pages in that exhibit, you will not say which page it is, nor will you say which name it is, nor will you say on which line the name appears, but you will take a red pencil and simply put a cross mark alongside the name you are referring to. Not a check mark, a cross mark.

All right. What was the last question?

(Question and answer read.)

By Mr. Williams:

Q. Is your recollection refreshed concerning whether they were classified 1, 2, 3 and 4? A. Well, I see such figures on Court's Exhibit 2 for identification, but my recollection is not refreshed.

Q. It is not refreshed? A. No.

Q. You do recall, as I understand your testimony, Mr. Pierpoint—if I am in error, please correct me—that there was some classification made of them; is that correct? [958] A. I am not sure what you mean by "classification." We considered the information. Now—

Q. The information which you got from the Bureau of Internal Revenue? A. Yes.

Q. When you considered the information, it was for purposes ultimately of selection of a jury, was it not? A. Yes.

Q. When you were considering the information, did you consider it in relationship to which jurors would be best for your purposes, next best, third best? A. Well, in those specific terms I simply can't recall.

Q. Let me say—

By the Court:

Q. Do you recall, Mr. Pierpoint, at any time participating in any discussion either with Mr. McMahon or any of

your associates or anybody else on the staff of the United States Attorney where the subject of discussion was the preparing of a test by which you could find jurors who would be, to use Mr. Williams' words, favorable to the Government? A. No, your Honor, I don't.

[959] Q. Do you recall any conferences at which you were trying to find a way to ascertain who would be favorable to the Government? A. Not to my recollection, your Honor. My recollection would be that any conferences we had—well, it's kind of the reverse side of the coin. My recollection would be that any conferences we had were designed to guide us in our challenges of the jury, and I don't think we were looking for people who would be favorable to the jury—to the Government, but rather looking towards the elimination of people who might be unfavorable.

By Mr. Williams:

Q. Expressing it negatively, then, Mr. Pierpoint, what criteria were used vis-a-vis the information that you got from the Bureau of Internal Revenue in making a determination as to unfavorability?

Mr. Christy: I will object to that.
The Court: Overruled.

A. Frankly, I don't know whether this is recollection or reconstruction, but I should say, for example, that, if we had found someone who had had some difficulty with the Internal Revenue Bureau, that would have been a factor indicating that we would not [960] want to select him as a juror, would want to challenge him.

The Court: Do you mean by that that that in your opinion would indicate the possibility that that

person might have a bias against convicting anybody charged with evasion of taxes?

The Witness: I think that is so, your Honor. I say I can't recall whether that is recollection or reconstruction now on my part. I just don't know. That is what I would expect to do under the circumstances and whether I recall it or not I just don't know.

By Mr. Williams:

Q. What other criteria were there, Mr. Pierpoint? A. That is the only one I can recall, if I recall that one.

Q. Did you use as a criterion whether or not a person had secured a refund? A. I don't recall.

Q. Do you recall using as a criterion whether or not unusual deductions had been taken on the returns examined? A. I don't recall but we might have done.

Q. Do you recall taking as a criterion the amount [962] of tax paid in relationship to the amount of income declared? A. I don't recall.

Q. Do you recall taking as a criterion the amount of income? A. I don't recall.

Q. Do you recall taking as a criterion the occupation? A. I don't recall, but it would seem to me now that we probably would have done, but I honestly don't recall now what we did then.

Q. Do you have any recollection of a discussion on the information furnished you by the Bureau of Internal Revenue? A. Yes. I am sure I discussed it. I am sure that I participated in whatever was done.

Q. Do you recall with whom you discussed it? A. Again, I don't know whether this is recollection or whether it is reconstruction, but I would say, and I think this is recollection, that I discussed it with Mr. McMahon at least, possibly with Mr. Seymour.

Q. Now, at the time you discussed it with them, do you recall whether or not criteria were discussed? A. I think they must have been but I don't have [963] any specific recollection of it.

Q. Now, do you know, Mr. Pierpoint, who in fact made that classification there?

The Court: You mean who wrote down the numbers or other notes?

Mr. Williams: Yes. I should have been more specific.

A. I couldn't be sure. I might guess whose numbers those are but I couldn't be sure.

Q. I don't want your guess, but I would like your best—

The Court: Can you do anything better than guess? If you can't, we will leave it at that.

The Witness: I think in all honesty, your Honor, it would be a guess.

The Court: Very well. In all honesty you had better not tell us the guess.

By Mr. Williams:

Q. Do you recognize the handwriting of any of your associates on that list? A. Well, that is what I would have to guess about.

The Court: No, you will find, if you examine closely on the left-hand margin—it is a rather narrow margin, but you will find some pencil initials, [964] what appear to be initials. I missed it the first time I looked at it. Look at that and see if those letters—

The Witness: No, I couldn't even guess about those.

The Court: Very well.

Powell Pierpoint—for Defendant—Cross

By Mr. Williams:

Q. Do you remember having seen any written report from the Bureau concerning the inspection of the returns of the prospective jurors? A. No.

Q. Do you remember having known that there was such a report in existence, whether or not you saw it? A. Well, I am sure there must have been something in writing. I just can't conceive that the information could have been given to us orally, so that there must have been something in writing, but I don't recall what it was or in what form it was.

Mr. Williams: I have no further questions, your Honor.

Cross-examination by Mr. Christy:

Q. Mr. Pierpoint, you never saw any of the tax returns of any member of the panel prior to the trial, did you? [965] A. I don't believe so.

Q. And, of course, you never talked to any member of the panel prior to the trial? A. No.

Mr. Christy: No further questions, your Honor.

(Witness excused.)

The Court: Have you another witness that you can finish with in the remaining seven minutes?

Mr. Williams: Would your Honor indulge me just one moment?

The Court: Yes, sure.

Mr. Williams: I want to say I will excuse the witness Geissler so he can go back home if he desires to do so.

The Court: By the way, you were going to get some information from him about his diary. Maybe you can use the seven minutes for that.

Mr. Williams: Do you have it?

Mr. Leath: Your Honor, I know he was in contact with his home.

The Court: Yes, Mr. Geissler said he would call his home office and see what he could find out.

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[966] PETER F. GEISSLER, was recalled and, having been previously duly sworn, testified further as follows:

Direct examination by Mr. Williams:

Q. Mr. Geissler, were you able to contact your office and get the information? A. Yes, sir.

Q. What were the dates on which you examined the returns, sir? A. On March 8, 1954, I examined the returns in the district director's office, Upper Manhattan.

On March 19, 1954, I traveled to Albany, New York, and examined the returns in the offices of the Intelligence Division at Albany, on that date.

The Court: What was that date?

The Witness: March 19, your Honor.

The Court: And the first one was March 8?

The Witness: Yes, your Honor.

The Court: Very well.

[967] The Witness: On March 23 I visited the Customs House, Lower Manhattan, New York, and examined returns in the office of the District Director there.

By Mr. Williams:

Q. Now, Mr. Geissler, there is an exhibit which is marked Court's Exhibit No. 2 for identification consisting

of 360 names of prospective jurors for the April panel of this Court.

Mr. Williams: I think perhaps the best thing for me to do is ask you, your Honor, to show him the exhibit.

The Court: Let the record show that I am presenting Court's Exhibit 2 for identification to the witness.

Q. We all agree that there are 360 names on that list. Do you want to look through that, sir? Then I want to ask you if your recollection is refreshed that you examined more than 150 returns. A. Mr. Williams, to the best of my recollection I examined approximately 150 returns. That is the best of my recollection.

Q. Let me ask you this way:

What percentage of persons whose names were [968] furnished to you did you not find returns for?

Mr. Christy: I object to that question, your Honor. He has already answered it.

The Court: Well, I think he has, but now we are going to get the percentage of it. I will allow it.

A. I don't know because the returns were invariably made when I went to the office. They had stacked the returns there and I immediately commenced to examine them. Whether there were more returns and the taxpayer had not filed, I don't know. All I know is I examined approximately 150 returns.

The Court: Any further questions?

Mr. Williams: No, your Honor.

Mr. Christy: No questions.

The Court: Now he can go back to Albuquerque?

Mr. Williams: Yes.

The Court: We will adjourn now until 10:30 Monday morning.

Mr. Christy: Your Honor, could we have some indication from Mr. Williams about how long he will be?

The Court: Well, before we get into that, I am handing back to you this list which has been marked Court's Exhibit 2.

[969] Mr. Christy: You are handing it to me, your Honor?

The Court: Yes, I am handing it to you because you want to have extra copies made.

Mr. Christy: Yes, and I will return the original to your Honor on Monday morning. I don't think we can have it photostated between now and the end of the day. If your Honor wishes I will leave it with the Court until Monday and have the photostat made during the course of the day on Monday.

Mr. Williams: Your Honor, I will take the same position that Mr. Christy took with respect to Exhibit N. I feel about that exhibit much the same way as Mr. Christy did, and I would prefer to have the photostat made and given back to the United States Attorney's office if that comports with the Court's feeling in the matter.

The Court: Isn't that what he is going to do?

Mr. Williams: I don't understand what he is going to do.

The Court: I am giving him the exhibit so that he can have it photostated. I don't know how he can have it photostated without the exhibit. [970] If you are going to ask that I personally go down and guard it while it is being photostated, I will deny that request.

Mr. Williams: Can it be done Monday, your Honor? I don't see any hurry.

The Court: Are you suggesting the possibility—you are not suggesting the likelihood, but the possibility of some modification?

Mr. Williams: I am not suggesting anything of the kind, your Honor. I am simply taking the same position the United States Attorney's office took with respect to Exhibit N, the night before last when I asked if I might take it for the night.

Mr. Christy: Your Honor, I have no objection. We will do it on Monday.

The Court: Just a minute. That was his exhibit and he said you couldn't have it. That happens a hundred times in trials when a man puts in an exhibit and won't allow anybody else to take it out. This is a record right from the Government's office. The only reason it is marked a Court's exhibit is so that it won't be disclosed to anybody. They subpoenaed it. Indeed, the testimony is that they prepared it.

[971] You may take it.

All right, now, before we go, Court's Exhibit 1 was a photostatic copy of that report that Mr. Geissler made on January 15, 1957, and that was sealed. We will take that apart and make a new envelope for Court's Exhibit 1, and put the original in there and the Government will have a photostatic copy made. Make a new envelope for Court's Exhibit 1.

Mr. Christy: There was a question pending, your Honor, if your Honor would inquire from Mr. Williams how much longer—

The Court: Are you able to give any estimate?

Mr. Williams: Not at this moment. I will talk to Mr. Wadden and give you an answer before I leave the Courthouse.

Peter F. Geissler—for Defendant—Recalled—Direct

I told your Honor the other day that I would give you in form the motion as amended so that it could be all in one sheet, and I am giving it to you now.

The Court: Here is an exhibit of yours, Mr. Williams, some papers that Mr. Fay produced.

Mr. Williams: Oh, yes.

[971a] The Court: Let the record show that that is now being delivered to Mr. Williams.

(Adjourned to October 14, 1957, at 10:30 o'clock, a. m.)

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[972] New York, October 14, 1957;
10.30 o'clock a. m.

Hearing resumed.

Mr. Christy: Your Honor, at the conclusion of Friday's session the Government asked if we could substitute a photostat for Court Exhibit 2. Your Honor indicated that you would prefer to enclose in a sealed file the original Court Exhibit 2. I have had it photostated. The Government has the photostat and I now submit to the Court the original Court Exhibit No. 2.

The Court: Very well.

Is there going to be any further examination about that?

Mr. Williams: I am sorry, your Honor?

The Court: I say will there be further examination on that?

Mr. Williams: Yes, your Honor.

The Court: Very well. Then I won't seal it at the moment.

Mr. Williams: May I proceed, if your Honor [973] please?

The Court: Yes.

James Vamvas—for Defendant—Direct

JAMES VAMVAS, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Vamvos? A. 685 Beck Street, Bronx.

Q. How long have you lived there, sir? A. About four or five years.

Q. What is your occupation at the present time? A. I am a waiter.

Q. Was there a time when you were employed by the United States Postal Department? A. Yes, sir.

Q. When was that? A. December 1951 until September 1956.

Q. In what capacity?

The Court: What was that? December, 1951?
The Witness: To 1956; September, 1956.
The Court: To September.
The Witness: Yes.
The Court: Very well.

[974] Q. In what capacity were you employed by the Postal Department? A. I was a substitute clerk.

Q. Where were you assigned during your employment? A. At that time the Ansonia station.

Q. How long did you actually work at the Ansonia station? A. Well, from December 1951 until around April, 1956, I think it was.

Q. During that period were you a mail clerk at all times? A. That is right.

Q. Was it your job to sort the mail? A. To box it.

Q. Do you know what a mail cover is, Mr. Vamvas? A. Pardon me?

Q. Do you know what a mail cover is? A. A mail cover?

Q. Yes. A. What do you mean by a mail cover?

The Court: Well, that is the question you are being asked. Do you know what it is.

The Witness: No.

The Court: You don't know?

[975] The Witness: No. Never heard of it.

Q. Do you know what a mail cover is? A. Yes.

Q. What is a mail cover? A. A mail cover is they tell us to watch, they had a certain person or name and hold it out.

Q. Now, during the time when you were employed at the Ansonia branch of the Post Office Department do you recall a watch on the mail of the Costellos at 115 Central Park West? A. Yes, sir.

Q. Are you able to tell us approximately what years watch was on? A. Well, sir, between 1952 and 1956, various times; I am not sure, but on and off.

Q. Now, what was method of handling the mail that was being watched, when the mail would ultimately go out on a drop delivery? A. Well, you box it up and in the morning after the bell rings, the one who pulls it out, whatever it is, 115 Central Park West, they look through the mail and pull out the party's name. Then you tie up the bundle, initial it, bring it to the carrier and put it in the drop bag, and the mail he had, he throws on [975-A] the superintendent's desk.

(Last answer read at the request of the Court.)

[976] The Court: Pardon me just a moment. Read that to me, please.

(Answer read.)

The Witness: The holdout.

The Court: The holdout?

The Witness: That's right. In other words the party's name.

By Mr. Williams:

Q. Do you remember whether or not 115 Central Park West was a drop delivery? A. Yes, sir.

Q. What is the fact on it, it was or it wasn't? A. It was a drop delivery.

Q. Did you ever come across mail which was to be delivered to Costello during a watch? A. As I am boxing up?

Q. Yes. A. Well, to be honest, I never looked, because I look at numbers.

Q. Let me see if I understand you. A. As I am boxing up I don't bother— ?

Q. Excuse me. When you use the term "boxing up," you mean sorting it? A. That's right.

[977] Q. When you are sorting during the night you look for what, addresses? A. Addresses.

Q. When is it that you look or make a search for mail on which there is a watch? A. I didn't get that.

Q. When is it that you made a search for mail upon which there is a watch? A. Well, after the bell rang, then you take out—if it was for the route, you leave it go to the route. If it was a drop, you look through the drop.

Q. When did the bell ring? A. Between, I would say, 10 to 8 to 8:10.

Q. What would you do with the rest of the mail for 115 Central West after you had gone through it and pulled out the mail on which there was a watch? A. I take that mail, tie it up in a bundle, bring it back to the route, throw it in the drop bag.

Q. Where was the drop bag in relation— A. On the route.

Q. What? A. On the route.

Q. The drop bag was on the route? A. Yes.

[978] The Court: What do you mean by being on the route?

The Witness: In other words, a route consists of a certain territory.

The Court: Yes. Was that located at a different place than the place where you were working?

The Witness: Yes, sir.

By Mr. Williams:

Q. What would you do then with the mail which had been held out for the watch? A. Then you take that and throw it on the superintendent's desk.

Q. Can you tell us from your experience—

By the Court:

Q. You pulled it out and gave it to the superintendent? I thought you said in your earlier testimony that you gave it to the carrier and it was his job to give it to the superintendent. A. No, sir.

Q. You pulled it out? A. If I tied out the bundle I pulled out the mail. If it was for—whoever it is, I take that mail and throw it on the superintendent's desk. The other [979] mail you tie up.

The Court: All right.

By Mr. Williams:

Q. Can you tell us from your experience as a clerk at the Ansonia branch what was the general practice? Did the mail which was held out for a watch on a drop delivery go out on the first delivery or did it not?

Mr. Christy: If he knows, your Honor.

The Court: That is what he asked him, whether he could tell what the general practice was.

A. No, it is impossible, because I myself plenty of times brought the mail back to the carrier when he is ready to leave. I throw it in the bag. He will drop the bag right away and go out on a skid out to the trucks, and I will still have that mail on the desk.

Q. You will still have what mail on the desk? A. For the parties held out.

Q. You will still have the mail watch mail on the desk? A. That's right, it will be on the desk.

Q. Was that the general experience that you had during your time? [980] A. That's right.

Mr. Williams: You may examine.

By the Court:

Q. What hours did you work as a rule? A. Well, I at the time was a sub. I worked 10, 12 hours a day, between 12 midnight and 12:30.

Q. Were you usually on that shift? A. Midnight?

Q. Yes. A. No, sir.

Q. When did you work on the midnight shift? A. Most of the time.

Q. And sometimes you worked other shifts? A. That's right.

Q. When you worked a shift other than the midnight shift, what shift did you work? A. It could be early or it could be late.

Q. What is the early? You see, you know about this and we don't. A. The early tour is 6 a. m. in the morning, and the late tour is 3.

Q. You mean sometimes if you didn't start at midnight you would start at 6 in the morning? A. Six in the morning.

[981] Q. And then other times, if you didn't start at either midnight or 6 in the morning, you started 3 in the afternoon? A. Yes.

Q. At the time you started to work at 6, how long did you work? A. Well, like I say, it varied, our hours. We used to get paid by the hour.

Q. I see. So sometimes you might work longer hours than others? A. That's true.

Q. And that would be true whether you started at midnight, 6 or 3 in the afternoon? A. Regardless of what time you worked.

The Court: All right.

James Vamvas—for Defendant—Cross

Cross-examination by Mr. Christy:

Q. Mr. Vamvas, you said that your recollection was that there was a mail watch on Costello in '52, '53, '54? A. Yes, sir.

Q. Now, in those years which watch did you work? A. What tour?

Q. Yes, what tour. A. Like I say, I changed around, but mostly the [982] midnight tour, because I wanted the hours.

Q. You would work beginning at midnight until when? A. Until they tell me to go home.

Q. What was the practice?

The Court: What was the usual length of time you worked?

The Witness: Well, I would say from September until January, 12 hours a day.

The Court: That is, if you started at 12 at night you worked through until 12 the next day?

The Witness: That's right.

Q. So you were working 12 hours a day? A. That's right.

Q. And most of the time in these years you were on the midnight watch? A. That's right.

Q. During the night, mail comes in at various intervals? A. That's right.

Q. And as a clerk you stand before a big case separating the mail into routes; is that right? A. (Witness nods.)

The Court: Did you answer that?

[983] The Witness: Yes.

The Court: Don't shake your head. I can't hear you when you shake your head.

The Witness: All right.

James Vamvas—for Defendant—Cross

By Mr. Christy:

Q. You stood before a case and you would separate the mail into the various routes? A. Right.

Q. And you had a box for 115 Central Park West? A. Right.

Q. Now, as you were separating this mail during the course of the evening, you would come across letters on which there was a mail watch and you would hold them out; is that right? A. No, because you don't look at names, you look at numbers.

Q. You never looked at the names? A. No.

Q. During the course of the evening there would be occasions when you would box up the mail to 115 Central Park West, is that right, it might be at 2 o'clock, you might do it again at 4 o'clock, you might do it again at 6 o'clock, whenever the box was full; is that right? [984] A. What do you mean?

Q. As you were separating mail during the evening, that is, from 12 until 8, you would box it up or tie it up, that is, the mail that was in the 115 box, every so often, wouldn't you? A. No. You only tie out twice.

The Court: What?

The Witness: When you box up, if the case got loaded, then you tie it out. If not, you leave it.

By Mr. Christy:

Q. The case got loaded during the course of the evening, didn't it? A. The upper case, not the whole thing. You skin out for the routes twice.

The Court: Just a minute. You told us you went through mail and found mail addressed to 115 Central Park West?

The Witness: That's right.

The Court: You told us also when you came across 115 mail you put it in the box for 115?

The Witness: That's right.

[985] *By the Court:*

Q. Now what you are being asked is was there ever an occasion where during the night maybe four o'clock in the morning, three o'clock, or five o'clock, that box for 115 became so filled that you took out what was in there and tied it up and put it in the drop bag? A. Never.

Q. You never did that? A. Never did that.

The Court: All right.

By Mr. Christy:

Q. Then the only time that you looked through the mail, that drop bag was after the bell at 7.45? A. Yes.

Q. What did you do then? You look through it? Then what did you do? A. If I skinned out 115 Central Park West then I will look through it, but if I didn't skin it out I didn't bother to look through it.

The Court: You mean there were times when you weren't assigned to do that skinning out?

The Witness: Instead of grabbing 115 I might grab 135 Central Park West, but there would be one man [986] on the route skinning out.

Q. How frequently were you the man who skinned out the 115 Central Park West mail? A. Like everybody else maybe once a week.

Q. Maybe once a week? A. Maybe once or twice a week.

Q. Now, on those occasions in which you skinned it out would you go through all the letters in that drop? A. All the letters.

James Vamvas—for Defendant—Cross

Q. And what would you do with those that were addressed to Costello? A. Throw them on the desk, the superintendent's desk.

Q. And the rest of the mail you wrapped it up? A. Tied up into the drop bag.

Q. Into the drop bag? A. Yes.

Q. And did the superintendent give the mail back to you? A. Give the mail back to me?

Q. Yes. A. No.

Q. So you don't know what he did with that mail? [987] A. It was on the desk.

Q. You left it on the desk; he didn't give it back to you? A. No.

Q. He looked at it? A. I didn't see him look at it. I seen it on the desk.

Q. And for all you know he could look at that mail and put it back in the drop bag before it went out? A. I got it because I saw it on the desk.

Q. Now, wait a minute. He could have done it. A. No, I never saw him do it.

The Court: Well, you never saw him do it. All right.

The Witness: No, sir.

By the Court:

Q. Was it your practice when you put the watch mail on his desk to stay right there to see what he did with it? A. Well, I would—

Q. No. Was that your practice or did you go off and do something else? A. I was right there at the next case, next to [988] the desk.

Q. Next to the superintendent's? A. Yes.

By Mr. Christy:

Q. What would you do there? A. Well, I would box up papers after the bell. I always worked the first case there.

Q. And the drop mail went out about what time? What time did it leave the post office? A. As soon as they get it. As soon as the carrier tied it down he was ready to leave.

Q. Well, in relation to the first bell when would that be? A. I would say, like I told you, about ten minutes to eight, ten minutes after eight.

Q. And the carrier went out a little after the drop mail, right? A. Yes.

Q. Then isn't it a fact, Mr. Vamvas, that the carrier would always take out with him that mail which you had skinned out during the night? A. That is right.

Mr. Christy: No further questions.
Mr. Williams: That is all.
(Witness excused.)

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[989] Mr. Williams: Your Honor, at the end of the day on Tuesday last, October 8th I moved that your Honor direct the Government to turn over the records that were kept of information received from the Post Office Department as a result of the mail watch, and Mr. Christy objected.

The Court: Where is that? I have forgotten.

Mr. Williams: Page 623, your Honor, which is the volume for Tuesday, October 8th.

The Court: 623? All right, let me take a look at it.

Yes, Mr. Williams, I see it.

Mr. Williams: At this time, your Honor, I would like to renew the motion that I made on that date for the production of those records.

The Court: Well, the record indicates at that time, Mr. Christy, you strongly opposed the production of those documents to the defense and I suggested that you think about it during the night and you could argue to me about it the following day, and Mr. Williams went on with some-

thing else. So that argument which you could have made we didn't get to.

Are you prepared to argue it now?

[990] Mr. Christy: Yes, sir.

The Court: Well, now, may I see the exhibit?

Mr. Christy: Yes, sir (handing to Court).

The Court: Before you go forward let me take a look at it. These are all pretty much the same in form, are they not, these various items that are on here?

Mr. Christy: As far as the form of report, your Honor?

The Court: Yes.

Mr. Christy: Yes, sir. It was a standard form that the post office used. There may be a couple that are not in there.

The Court: Very well.

Mr. Christy: Your Honor, I would object to the production of this document on the ground that there is no foundation for its production and on the ground of materiality.

That folder which your Honor has contains a report from the post office to the internal revenue agent listing the names of addressors of letters to Frank Costello at 115 Central Park West.

[991] Now, there is no question. The Government has admitted there was a mail watch on Costello. But assuming that some of the reports contained in that folder contain the names of persons who sent letters to Costello and had nothing whatsoever to do with the case and did not appear as witnesses, I certainly don't think they are relevant and material and assuming—

The Court: Well, let us take that in part. Let us assume that they contained the names of either a person or a firm to whom it was shown at the trial that Costello had paid money. What would you say about that?

Mr. Christy: That would be my next point, your Honor. Assuming that that is so, I still say that they are immaterial because there is nothing illegal about a mail watch.

The Court: That is a different question. That is just what we are here for. But Mr. Williams' point now is to establish the facts from which he is going to argue that that was illegal. In other words, he has to have some facts to base his argument on. That is his point.

Mr. Christy: Your Honor, a mail watch such [992] as this—

The Court: Do you not think it is relevant at least to the issue which Mr. Williams raises?

Whether he can prevail on it is another question and we have not got to the question of what the law is yet, but he claims that there was information secured which resulted in evidence adverse to the defendant at his trial, which evidence was secured by means of this mail watch which he says was illegal.

Now, is it not relevant for him to show that, for instance, with respect to the X-Y company, where the trial record shows that money was passed from Costello to the X-Y company, to show that at least the Government had information that there was correspondence passing between the X-Y company and Costello?

Now, it could be argued, I suppose, that the information that the Government got concerning the relation between Costello and the X-Y company came from entirely different sources and that may be so.

Mr. Christy: That is right, your Honor.

The Court: That is for the Government to show. I don't see how you can argue that Mr. Williams is not entitled at least to those.

[993] Now, if you have some other reasons other than those you have given me now with respect to those, I will hear it.

Mr. Christy: I have no other reasons for resisting the production, your Honor. Of course, it is part of the Government's files, but I don't think that argument is going to prevail upon your Honor at this time. I have no other—

Colloquy

The Court: I certainly will rule now that, with respect to any person or firm as to which it appeared at the trial Costello had paid money in the years in question, those reports must be made available.

Now, Mr. Williams, does that satisfy your demand or do you ask for not only those but all others?

Mr. Williams: If I understood your Honor correctly, you are prepared to rule that—

The Court: Here is what I have in mind, Mr. Williams, so there will be no doubt about it. My recollection of what occurred at the trial is quite hazy although I presided at the trial, but I do recall, without recalling names, that there was testimony, for instance, from bookkeepers or accountants or employees of some character from various department stores, and they testified from records that in given [994] months or, rather in given years the total of payments received from Costello was X-hundred dollars or more, whatever it was.

My point is that the names of any of those stores, if they appear on these lists, certainly should be made available to you and any other persons of that kind whose testimony came in at the trial.

Now, your demand goes beyond that, does it?

Mr. Williams: Well, I think it must, your Honor, because—of course, I haven't had the benefit of seeing the records but it is entirely conceivable that, as a result of the mail watch, the legality of which we will argue, I assume, at a later time, the Government secured leads to business establishments and then the chain of leads could have been followed from one business establishment which had sent mail to the defendant to another.

Now, the first one might not have been a fruitful source of information per se to the Government but it may have led immediately to one which was, and I have this in mind, your Honor. Let us take an example.

There was testimony in the record, as I have read it and as I recall it, that the defendant had cleaning bills in the

course of the year with a cleaning [995] establishment, the name of which slips me.

Now, if a lead to that cleaning establishment was secured as a result of the mail watch and, if the defendant used that cleaning establishment constantly, the agents of the Bureau of Internal Revenue could have gone to that establishment and they could have learned from that establishment the identity perhaps of the places where he bought his clothes by a cursory examination of those clothes which were on the rack at the time. So you would have—

The Court: Your reading of the trial record, I take it, has occurred much more recently than mine, but I have not read it since I went through it to prepare my charge to the jury. But I do have a recollection that, for instance, with respect to the matter you are talking about there was testimony from various tailors as to bills for suits and coats and things like that for Mr. Costello. So I am not very much impressed by that argument.

Mr. Williams: My point is, your Honor—I am just taking a hypothetical illustration to show—

The Court: You had better take a better one than that. If they were watching his mail, as they concededly were now, any bills that came through [996] that he paid, any place from which he got bills which he ultimately paid, if it was any kind of an establishment at all, the name of the establishment appeared on the letter and it was picked up in the watch.

Mr. Williams: Except if he paid for his clothes in cash and there were no billings, then the cleaning bill would have been the source of information potentially to the identity of the tailors.

The Court: Very well. That is a little better.

Mr. Williams: So I think there is a wider scope, your Honor, of curiosity on our part with respect to this—

The Court: That I am sure of.

Mr. Williams: May I add the adjective legitimate curiosity, your Honor.

The Court: I didn't hear that.

Colloquy

Mr. Williams: Wider scope of legitimate curiosity on our part—

The Court: I am not suggesting any part of your curiosity is anything but legitimate.

Mr. Williams: —with respect to this list. Because while it may be that there is not a direct expenditure directly related to one name on that list, [997] it is entirely possible that by indirection the same result is accomplished. I don't see how we could ever really explore that without having the list available to us and I don't see how the Government would be prejudiced in any way by our examination of that particular list.

It was the defendant's mail. It certainly is not information peculiarly in the possession of the Government. The difficulty is they made a record of it and we don't have one.

The Court: Can you help throw any light on this phase of the problem, Mr. Christy?

Mr. Christy: Your Honor—

The Court: Your point is none of it should be made available?

Mr. Christy: That is my point, yes.

The Court: You have no greater argument or different argument to urge here.

I think there is a good deal to what Mr. Williams says with respect to those names other than these that appeared at the trial. They might have conceivably been leads to other evidence. The question of legality is to one side at the moment but I will make them available to him.

[998] Mr. Christy: Very well, your Honor.

The Court: Let this be marked—do you have copies of this or is this your original record?

Mr. Christy: That is the record, but in anticipation of your Honor's ruling I have provided myself with photostats.

The Court: Well, I have a comment to make there but I shall withhold it.

Mr. Christy: Are you going to make that Court Exhibit No. 3?

The Court: No, I won't make it a court exhibit. I will make it available to the defendant.

You represent that this is an accurate photostat of this?

Mr. Christy: I have not compared it. It would only take a second, your Honor.

The Court: By the way, gentlemen, we will adjourn today at 12:30. I have a hearing in another matter at 12:30. We will adjourn at 12:30 and then resume at 2:15.

(Pause.)

Mr. Christy: This is a complete photostat, your Honor. Shall I turn the photostat over to Mr. Williams?

[999] The Court: Let the record now show Mr. Christy hands the photostat to Mr. Williams, a photostatic copy—what is that called?

Mr. Christy: On the cover, a copy of which I have not furnished Mr. Williams, it says "Mail Watch."

The Court: It is those reports which the Post Office Department, according to the testimony, turned over to the Internal Revenue agents?

Mr. Christy: That is right.

The Court: From the mail watch.

Very well. Do you want some time now to look at them or can you go ahead with something else? If you prefer to do it now, all right. I am trying to find out the fact. If you prefer to do it now, we can take a short recess and let you look at it.

Mr. Williams: I would like to look at it for a few minutes.

The Court: Try not to make it too long. We will take a short recess while you do.

(Short recess.)

Wilfred T. Leath—for Defendant—Direct

[1000] WILFRED T. LEATH, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Mr. Williams: Your Honor, may I borrow from the Court, please, the list which I furnished to the Court of dates on Exhibit I which is the exhibit dealing with the mail watch orders?

The Court: Yes (handing to Mr. Williams.)

Direct examination by Mr. Williams:

Q. Would you state your address, Mr. Leath? A. 3734 84th Street, Jackson Heights, New York.

Q. How long have you lived there, sir? A. About nine years.

Q. And what is your occupation at the present time? A. I am group supervisor in the Intelligence Division of the Internal Revenue Service, New York.

Q. How long have you been so occupied? A. I have been group supervisor since July, 1956.

Q. How long have you been a special agent for the Bureau of Internal Revenue? A. Since November of 1945.

[1001] Q. Mr. Leath, did you work on the case in which are presently making inquiry, the case of United States v. Costello? A. Yes, sir.

Q. When did you first begin your work on that case? A. I think the actual date was June 10, 1952?

Mr. Williams: Mr. Clerk, would you please mark this exhibit which purports to be the information received by the Bureau from the Post Office Department Defendant's O for identification.

(Marked Defendant's Exhibit O for identification.)

The Court: What was that date you said you began to work on this case?

The Witness: June 10, 1952.

Q. Mr. Leath, I want to ask you a few questions on this exhibit which has just been marked O for identification. I

am going to hand you a photostat of it so you can follow along with me if you will, please.

First of all, Mr. Leath, this does not include, does it, all of the reports that you received from the Post Office Department as the result of the watch? [1002] A. I can't say whether it does or not, Mr. Williams.

Q. Well, I take it the slips which constitute this exhibit came from your files, did they not? A. Yes, sir.

Q. When were they put together in the form in which they presently appear? A. Can I see the original?

Q. (Continuing) As Defendant's Exhibit O for identification (handing to witness). A. My best recollection on that, Mr. Williams, would be that this was put together at the conclusion of the case in our office. That is prior to the time it was referred to the United States Attorney's office. Specifically as to date I would say probably around January 1953.

Q. In other words, this exhibit was put together in its present form in January 1953, and I refer to Defendant's Exhibit O for identification. A. That is as I recall it now, yes.

Q. Is it complete as it was put together at that time? A. I have no way of knowing—it would appear to be complete. I really don't know.

[1003] Q. Now, isn't it the fact—

> The Court: By that you mean it appears now to be in the same condition it was when it was turned over? Is that what you mean?
>
> The Witness: Yes, sir.

Q. Isn't it the fact, Mr. Leath, that during such time as your office had the post office put a mail watch on Costello, during those periods, you always received information back from the post office concerning the addressors of mail to him? A. Did we always receive it?

Q. Yes. A. Probably. There may have been one watch in which nothing was returned because no mail, but as far as I know we got something back.

Q. Yes. Your recollection is always you got something back? A. Yes.

[1004] Q. Turning to this exhibit, Defendant's O, would you turn, Mr. Leath, to the third page from the back on that exhibit? A. (Witness complies.)

Q. The exhibit reflects that you were receiving information from a mail watch back in 1950, does it not? A. You are referring specifically to the typewritten portion there, Mr. Williams?

Q. Yes. A. Yes.

Q. As a matter of fact, the exhibit shows that there was a mail watch in the case at the time that Mr. Cordes was handling the case, does it not? A. Yes, sir.

Q. Because the initials "SWC" appear beside one of the returns received from a mail watch; is that correct? A. Yes, sir; two of them.

Q. Yes. Now turn forward, if you will, please, Mr. Leath, some four pages. A. That is the short one?

Q. Yes, sir. Does that refresh your recollection that tracings were made in this case on the mail watch? [1005] A. Well, I would prefer to see the original for that, Mr. Williams.

Q. I am handing you herewith the original of Defendant's Exhibit O for identification (handing). A. The only way I could answer that would be this, Mr. Williams: This would appear to be a tracing. However, since it was received prior to the time I went on the case I would have no personal knowledge of it.

Q. Do you recall receiving other tracings like this, sir? A. No, sir.

Q. You don't? A. No, sir.

Q. This is the only one? A. From the time I went on the case until I was through with it, I don't recall receiving any other tracings.

Q. Did you have to get a different type of order in order to get tracings than you did in order to get just return addresses? A. No, sir.

Q. Did they generally send you tracings when there was no return address? [1005] A. No, sir.

Q. In this exhibit, Mr. Leath, I am going to have to ask you to look through it— A. From the beginning?

Q. —as I ask you these questions.

There is no information that appears on this exhibit from mail watches from November 9, 1953, to any point thereafter, is there? As a matter of fact, there is no information there which comes in the year 1953, is there? A. May I look through it?

Q. Please.

(Witness examines document.)

A. None of the dates referred to in here refer to the year 1953.

Q. Now will you look at the first page of the exhibit? A. Yes, sir.

Q. Does the bottom annotation on this first page not indicate that there was a mail watch on in the month of June, 1952? A. I can't definitely state that that is what the June, 1952, notation on here means.

Q. Are those initials which appear at the bottom [1007] of the page Mr. Geissler's initials? A. Yes, sir.

Q. And the date June, 1952, appears after that, does it not? A. Yes, sir.

Q. Then directing your attention to the next sheet, which is the second of the exhibit, there are dates appearing there showing that information was received in July of 1952, isn't that so? A. You are referring now to where it says "OK," and so on?

Q. Yes. A. No, sir, that wouldn't necessarily mean that.

Q What does that mean? A. For instance, if you look down at the next one, the second card on the sheet, it says, "Received 11/2/51, SWC."

Q. And that is by Mr. Cordes? A. Yes, sir. On the same sheet you see the date July 3, 1952. Now, that means that on that particular date—these are my initials—I

checked to make sure that this particular lead had been taken care of.

Q. Well, this lead was received, then, on November 2, 1951, by Mr. Cordes, was it not? [1008] A. Yes, sir.

Q. Now turning to the third page of this exhibit, to the third item down— A. Yes, sir.

Q. —that indicates that that watch was on in October of 1951, does it not? A. Yes, sir.

Q. And again the tracing to which I have previously referred shows a date of October, 1951, does it not? I will show you the original. A. October, 1951, yes, sir.

Q. And that was at a time when Mr. Cordes was working on this matter? A. Yes, sir. I might explain that, Mr. Williams, that last answer, if I may, please.

Q. Sure. A. I think Mr. Geissler's testimony was that he had taken over this case some time in 1950. Under those circumstances, I believe that the fact that Mr. Cordes initials appear here would be because at that time Mr. Cordes was his particular group supervisor and he had received this reply in his group. It does not necessarily mean that Mr. Cordes was active on this case at that time.

[1009] *By Mr. Williams:*

Q. My question was rather directed to the dates than the persons, Mr. Leath. A. Yes.

Q. Now will you turn forward, Mr. Leath, to the eighth page counting the short pages you refer to? A. The short pages—the first one?

Q. No, I count that as one of the pages. If you will turn forward to the eighth. A. I only go up to three forward from that.

Q. 1, 2, 3—

The Court: Counting from the top.

Q. I am counting from the top. A. Starting with the fifth?

Q. Yes, starting with the top. A. That is, with the typewritten—

Q. Yes. A. That top?

Q. Yes. Now that is the next sheet on which we have a date, is it not? A. Yes, sir.

Q. And the dates on this particular sheet show that information was being received in July of 1950, isn't that so? [1010] A. I don't see that date on this particular—maybe you can point it out to me, Mr. Williams, please.

Q. (Indicating.)

The Court: Why don't you check the original. The photostat may be in a different order. Why don't you check the original there to make sure you are talking about the same piece of paper.

Mr. Williams: No. This is the same one, your Honor. This is the eighth page.

The Witness: Oh, I am sorry.

Yes, sir. 1950.

Q. And that was in July of 1950, is that right? A. Yes, sir.

Q. And it also indicates information was being received in October 1951, and I address your attention to the item immediately above that. A. This is November 1951, I believe, Mr. Williams. I think you said October.

Q. Well, the postmark I believe is October 1951. A. Oh, yes, sir.

Q. Then if you will turn the page, please, Mr. Leath, the next date with which we are benefited is February of 1952 showing that information was being [1011] received in February 1952, is that correct? A. Yes, sir.

Q. And if you will turn the page again, please, Mr. Leath, the next date which we have reflected on this exhibit is December of 1951 showing that information was being received at that time? A. Yes, sir.

Q. And again in January of 1952, is that correct? A. Yes, sir.

Q. Again in February of 1952? A. Yes, sir.

Q. And those are all the dates that appear on this exhibit, so far as we have seen? A. Yes, sir.

Q. Now when you have a mail watch on, Mr. Leath, for 15 days what was the normal productivity on that mail watch in so far as providing addresses? A. You are speaking now—

Q. Speaking of Costello. A. Yes, but in relation to the overall case or—

Q. No, I mean in the course of 15 days when you had a mail watch on him how many addresses would you receive from the post office? A. I would have no idea on that.

[1012] Q. Well, you would receive more than one? A. Oh, yes.

Q. Now, does it suggest to you, Mr. Leath, that when you received only two slips from a mail watch from July 1, 1952 to July 15, 1952, that some of those slips may be missing? A. That we received from July 1, 1952 to July—

> The Court: Isn't your question rather the fact that only one or two appeared to be recorded in the exhibit?
>
> Mr. Williams: Yes.
>
> The Court: Does that suggest that there are others that were received and are missing?
>
> The Witness: I would have no way of knowing that.

Q. Would your answer be the same with respect to other: You have no way of knowing whether items are missing, is that correct? A. Yes, sir.

Q. But you do recall that you received more than one or two addresses from a mail watch, do you not? A. Yes, sir. I might point out, too, sir, that at this particular time I am not quite certain of the [1013] manner in which the post office sent us replies; that is, their practice now is to send us almost daily reports. At that time I think their practice was to hold these until the 15 days or whatever period it was it was completed.

Q. Mr. Leath, can you help us in this respect: We have been supplied here with the dates of the mail watches by

the post office which have been identified as Defendant's Exhibit I; from the records which you have now provided in the form of this Defendant's Exhibit O it is clear that we are missing mail orders.

Mr. Christy: Objection, your Honor.

The Court: Well, Mr. Williams can make that in the form of an argument. I think what is clear is that in Exhibit O there appears to be no reports for some of the periods covered by the orders. Is that a correct statement?

Mr. Williams: Yes, and I was taking the other facet of it, your Honor, that there are reports for periods in which we have no orders.

The Court: That is argument. The point is, what does the exhibit show? You say missing. Now in the context of this motion that has a rather [1014] sinister overtone which Mr. Christy rightfully objects to.

Mr. Christy: A good many of these slips are not dated at all, your Honor.

The Court: Well, all right. We will take one thing at a time. The point is it appears now to be clear that there were orders for periods for which no reports appear in Exhibit O.

Mr. Williams: Yes, sir.

Mr. Christy: Well, that can't be drawn as a conclusion as I say because some of them aren't dated, your Honor. That isn't necessarily true.

The Court: Well, I don't understand that anybody is saying it is true. We are talking about appearances.

Mr. Williams: My question goes to the other side of the point, your Honor.

The Court: I know your question goes to it and you may go to it, but the difficulty is you say there are missing. Now we have what the exhibit appears to show, and you are quite free to examine the wit-

ness to ascertain whether—what you are getting at is, weren't there other reports received in these periods which do not now appear in Exhibit O, [1015] and if that is so, where are they and why aren't they there. That is what you want?

Mr. Williams: I will adopt that question, your Honor.

The Court: Well, now, don't rely on me. You are more familiar with this than I am and you take your own course.

By Mr. Williams:

Q. Do you have any explanation, Mr. Leath, as to where other records received from the mail watch are? A. Mr. Williams, I don't know whether there are any missing from here or not. So I wouldn't—I couldn't answer that.

Q. Now do you have any records, Mr. Leath, which would show other than these slips that you had a mail watch on prior to December 26, 1951? A. I would have to answer that question from memory, Mr. Williams. My best memory on that point would be that we did not have anything that would indicate mail watches prior to December, 1951.

Q. You had only— A. Other than what would be shown on this exhibit.

[1016] Q. Yes. There is nothing to show so far as you know in your records at this time that a request was made of the post office to put a watch on prior to this time other than what appears in this exhibit? A. As far as I know, yes, sir.

Q. I want to leave that, Mr. Leath, and ask you if in 1954 you were working on this case? A. Yes.

The Court: Before you leave that subject of this Exhibit O do you mind if I ask a question here for my own information?

Mr. Williams: No, sir.

By the Court:

Q. Do you know whether it was the practice, Mr. Leath, to keep all of the reports that were received from the post office on the watch? A. That would generally be the practice, yes, sir.

Q. That would generally be the practice that you kept all? A. Yes, sir.

Q. Now, if you had a watch on say from September 15 in a given year until October 15, do you know whether there were occasions where you got duplicate reports of [1017] more than one piece of mail coming from the same addressor? A. No, sir.

Q. You don't recall anything on that? A. No, sir.

Q. Well, if you got a report that the dependant was having correspondence with X, for instance, in the first period of watch, and then in a subsequent watch you got another report that he got mail from the same person, would it be the practice to keep both of those reports? A. Yes, sir.

The Court: Very well.

By Mr. Williams:

Q. Do you know who prepared this exhibit, Defendant's O for identification in its present form? A. No, sir.

Q. Now, Mr. Leath, directing your attention to March of 1954, do you recall a request being made of the collectors of the district of Upper Manhattan, Lower Manhattan and Albany to pull returns for those persons who were on the April jury panel in this court? [1018] A. I have knowledge of that although I had no part in the actual request.

Q. You knew it was done? A. Yes, sir.

Q. Do you know who did it? A. Mr. Geissler pulled the return—he didn't pull the return; he inspected them.

Q. Do you know who made the rejuest that the returns be pulled? A. I believe Mr. Murphy.

Q. Do you know at whose request Mr. Murphy made that request? A. Mr. Lloyd MacMahon.

Q. Now, do you recall the information that was supplied by Mr. Geissler on this subject matter? When I say do you recall, I mean do you recall in what form it came to you? A. No, sir, it didn't come to me.

Q. To whom did it come? A. To Mr. Murphy.

Q. Did you ever see it? A. I may have seen it. I have no recollection of having seen it.

[1019] Q. Do you know, Mr. Leath, whether or not any summary or analysis was made of the information supplied by Mr. Geissler to Mr. Murphy? A. I have no knowledge of that, Mr. Williams.

Q. Do you know whether or not this information was passed on to the United States Attorney's office? A. My best recollection, Mr. Leath, is that it was, but not by me.

Q. By whom was it passed on to, to the best of your recollection? A. Mr. Murphy.

The Court: You say Mr. Murphy?
The Witness: Yes.

Q. Were you present at the time when it was passed on? A. I was present on one occasion when this information was transmitted to Mr. MacMahon but whether or not that was the first time he had been consulted about it I don't know.

Q. Where did this particular meeting take place? A. In the United States Attorney's office.

[1020] Q. In Mr. McMahon's office? A. If I recall, we were using several rooms at the time? Which particular room I don't recall.

Q. Do you know, Mr. Leath, whether it was passed on to him in the form of written reports? A. Well, the time I am speaking of when I recall Mr. McMahon receiving the information, it was given to him orally, but, as I said before, I don't know whether that was the first time he had got it or whether he had received it previously.

Q. What is the time you are speaking of? When did that take place? A. Well, that probably was two or three days prior to the start of the trial. So probably around the first of April, 1954.

Q. Was that at the time when a classification of the jury panel was made? A. Well, I think it would be best to answer it this way, Mr. Williams: The information was given for the purpose of classification but whether the classification was made at that particular time I don't know. I wasn't there for the whole meeting.

Q. Who was there, sir? A. As I recall, Mr. McMahon was there I know [1021] definitely. I believe Mr. Pierpoint, I believe Mr. Murphy was there for at least part of the time that I was there, and there may have been one or two others. I don't recall.

Q. Do you recall the actual classification being done in your presence? A. No, sir. I had nothing to do with the classification and I didn't make any classification.

The Court: The question is did anybody else do it while you were there.

The Witness: I don't know, sir, as I said before, whether the classification was made at that particular time or at some other time.

Mr. Williams: Would your Honor show the witness Court's Exhibit 2, please.

The Court: Let the record show that the Court is handing the witness Court Exhibit 2 for identification.

By Mr. Williams:

Q. Have you ever seen that before, Mr. Leath? A. I have seen it in the last few days, yes.

Q. Did you see it in 1954? A. Not that I recall.

Q. Does that refresh your recollection as to the [1022] time or circumstances when that classification was made?

A. As to the time, Mr. Williams, the only point that I could establish there would be that I know that this particular meeting that I am referring to occurred two or three days before the trial.

Q. I want to ask you a couple of questions about that exhibit. You are aware of the Court's admonition on it concerning the divulgence of names? A. Yes.

> The Court: You will not divulge any name, any address or any other information, nor will you indicate any page from which you may be reading.
>
> The Witness: Yes, sir.
>
> The Court: Or at which, rather, you may be looking. You are not to read anything from the page unless instructed to do so.

By Mr. Williams:

Q. Other than the classifications, the numerical classifications of those jurors, do letters appear besides some of their names? A. Yes, sir.

Q. And do the letters follow the numbers? A. No, sir.

Q. Are the letters— [1023] A. I see. Yes, sir, in some instances.

Q. What are the letters, sir?

> Mr. Christy: Objection, your Honor.
>
> The Court: Let me see it.
>
> (Handed to Court.)
>
> The Court: Objection sustained.

By the Court:

Q. Do you know whether or not, wherever the letters appear, the letter was a further form of classification in addition to any numeral that may appear there? A. No, sir.

Q. You do not know? A. No, sir.

Q. Do you know what, without telling us what it is if you do know it, but just answer the question, the significance of the letters in any case is? A. No, sir.

The Court: Very well.

Mr. Williams: I am not sure how far your Honor's ruling goes. I certainly don't--

The Court: The point is this: He will not be allowed to describe the letter, that is, which letter of the alphabet it is. I have tried to ascertain [1024] whether or not he knows what the significance of those letters is. He says he does not. If you desire to ask another question, I am not foreclosing you unless I know what the question is.

Mr. Williams: I am flying a little blind here, your Honor, because everybody who is a part of this knows what we are talking about at the moment except me. So I hope you will bear with me that I am trying to comport with your Honor's ruling.

The Court: Yes, and I think you have made a very good success in complying with it and we are doing our best to let you have the fullest exploration, without disclosure, which we think proper. When I say "we," I don't mean the United States Attorney and the Court. I am using, if the press will excuse me, an editorial "we" there.

By Mr. Williams:

Q. Mr. Leath, do I understand from your answers to his Honor's questions that you have no information whatsoever on the significance, meaning, import, implication of the letters about which I have asked you? A. No, sir.

Q. You have no information? A. (Witness shakes head in the negative.)

[1025] Q. Other than they appear on that sheet? A. Yes, sir.

Q. Do they appear beside many of the names or simply isolated instances?

Mr. Christy: Objection, your Honor.

The Court: Overruled.

A. I would say roughly about 18 per cent of the names.

Q. You say roughly 18 per cent? A. Yes.

Q. You mean about one for five? A. Yes.

Q. Do the letters, Mr. Leath, spell words? A. No, sir.

Q. Mr. Leath, were you the custodian of the records in this case in so far as the Bureau of Internal Revenue is concerned?

Mr. Christy: Objection, your Honor. What records is he talking about?

The Court: Overruled. I take it he means all records.

A. That is difficult to answer, Mr. Williams, because of our peculiar setup. I mean the records were kept in various places or they may be duplicates of [1026] other records. Officially I am not custodian of any records. I have access to them.

Q. I mean actually were you the custodian? A. No, sir. Because of this situation where part of the files would be in one place and part in another, I couldn't say that I was custodian or had possession of all of the records, no, sir. I had part of them.

Q. Do you know, Mr. Leath, whether there were any records kept by the Bureau of Internal Revenue concerning the inspection of the income tax returns of the persons who sat on the April jury panel? A. Are you talking about the entire panel now?

Q. Yes. A. I believe there is one record which would indicate the returns that were requested from the Albany district.

Q. And is that still in existence? A. Yes, sir.

Mr. Williams: I would like to move at this time, if the Court please, that the Government produce that record.

The Court: Do you have it?

The Witness: It is in Mr. Christy's office, [1027] I believe.

The Court: Do you have it?

Mr. Christy: I have seen it. It must be down in my office, your Honor.

The Court: This is a copy of the list of names submitted to the Albany office to have the tax returns pulled?

The Witness: Yes, sir.

The Court: Does it also contain or indicate the names of those returns which were actually found and looked at by Mr. Geissler?

The Witness: No, sir.

The Court: Just the names of those that were asked?

The Witness: As determined by their address, yes, sir.

The Court: Do you have it up here with you, Mr. Christy?

Mr. Christy: No, I don't think so, your Honor.

The Court: Can you get it to submit to the Court?

Mr. Christy: Yes. And may I argue on its production at that time?

[1028] The Court: Yes, even before you hand it to me you may, indeed. But just have it here in such secure form as you think appropriate, but let

us have it so that I may have a look at it if you don't dissuade me that I should not.

It will be produced.

By Mr. Williams:

Q. Other than that record which—

The Court: That is, it will be produced for the Court's examination. I am not ruling now as to whether or not it ought to be produced to you.

I can see now some reasons why it should not, because the very problem that required me in my opinion to keep from you the jury list exists in this instance. However, we will have a look at it.

Q. Other than the record which you have just described for us, which I understand to be a request to the Albany director to pull certain returns of persons who were on the April 1954 jury, other than that record, is there any record or was there any record, Mr. Leath, kept by the Bureau of Internal Revenue concerning this overall subject matter, and by that I mean the inspection of the income tax returns of the April 1954 jury panel of this court?

[1029] The Court: Now, wait a minute. I can't follow that question myself because you say "was there one kept," and that is a concept that I think is a little different than what you have been asking about before, namely, was one made.

A. Mr. Williams—

The Court: Just a moment.

By Mr. Williams:

Q. I will amend my question by asking you if such a record was made, Mr. Leath? A. I don't know, Mr. Williams, since I had no part in the requisitioning of the returns.

Wilfred T. Leath—for Defendant—Direct

Q. Is there any record in existence, to your knowledge— A. No, sir.

Q. —on this subject matter now other than the request to the Albany director, which you have just described, and Court's Exhibit No. 2, which is before you? A. Not to my knowledge.

Q. Is there not likewise a request of the collector or the director for the upper district of Manhattan on this subject matter? A. Not that I know of, Mr. Williams.

[1030] Q. And I take it your answer is the same for the lower district of Manhattan? A. Yes, sir.

Q. The only one of which you have knowledge is the one that went to Albany? A. Yes, sir.

Q. Who made that request, Mr. Leath? A. The request is signed with my name, not with my signature, and I have discussed that particular point with Mr. Murphy and, as a result of our discussion, it appears that he gave me—he actually wrote the memorandum and gave it to me to have it typed and my stenographer typed it and, since I had given it to her, apparently assumed it was to be for my signature and my particular group chief at the time signed my name to it. That is the only recollection I have of it.

Q. Who was it who did the job of categorizing the panel with respect to which district they would be required to file their returns in?

The Court: Mr. Williams, I think I have given you plenty of latitude here where I thought I could. I don't quite at the moment see the materiality of this. It has been testified that somebody under the direction of Mr. Murphy—who the person was we don't [1031] know, but it seems to me to be immaterial who that person was—the testimony now shows that somebody under Mr. Murphy's direction compiled a list of the names that appeared on the jury panel and, segregrating them by their addresses and

assuming that those persons would file their returns in the appropriate office according to their addresses, sent those names to the three Internal Revenue offices, one at the Custom House, one at Midtown Manhattan and one at Albany. It is not denied that that was done, nor is it denied that the directors in those three offices, each of the directors who was asked, got out the income tax returns for every one of those people appearing on the list that he got who had actually filed returns, and the testimony is, by Mr. Geissler and I think by Mr. Murphy also, but certainly by Mr. Geissler, who did the examining of the returns or the inspection of the returns, that altogether in the three offices he got but 150.

Now, who actually did the segregating of the names it seems to me is of no materiality here at all. The fact that they were pulled, the fact that they were inspected, the fact that the information respecting that was given to Murphy and he used it in the [1032] manner he testified to, is all clear in the record.

You may pursue the question now as to what record or what data, if recorded, is available in the files of the Bureau. That I don't propose to foreclose you from full examination with respect to that.

Q. Is there any other record or memorandum or written report available, to your knowledge, in possession of the Bureau of Internal Revenue or the United States Attorney's office on the subject matter of the inspection of the jury returns and/or the classification of the jury panel? A. I can't only answer, Mr. Williams, with respect to the particular files in my own office and the files I have looked at in the United States Attorney's office, and I find none.

Mr. Williams: Your Honor, this morning we ascertained that the transcript in this case does con-

tain the examination on the voir dire. That transcript is in the possession of the clerk and he, of course, won't let it out of his possession without a direction from your Honor.

I respectfully move that your Honor direct that that portion of the transcript be sent to this Court because I think we have reached a point where it [1033] becomes highly material to the inquiry which we are making.

The Court: Yes, I will so direct.

Mr. Williams: We have physically segregated it, your Honor, from the rest of the transcript so that we will have only the voir dire and the actual jury panel's names?

The Court: Very well.

Mr. Shilensky: Actually, your Honor, it is in the record room, in Room 507.

The Court: It is in the custody of the clerk of the court, Mr. Charlson.

Mr. Williams: Your Honor, I have been giving a great deal of thought over the weekend as to how we could fulfill the objectives, I think, of all of us to not embarrass anybody who sat on this jury panel and yet making available such information as can be made available to the defendant for the intelligent pursuance of this subject. I offer this as a suggestion, your Honor, that this jury panel, as I understand it, consists of 360 names. I think that perhaps we could accomplish your Honor's objective if we used a different system of numbering the jurors and refer to them only numerically.

[1034] I have in mind the jurors who actually sat and who actually had a part in the case, not those members who were not even called with respect to the case or had no part in it.

My thought is this, your Honor: that perhaps we could take the jury list seriatim, 1 through 10,

scramble the numbers so that they would be unidentifiable from reference in open court, and do that with respect to the whole 360 of them, and then, during the interrogation on any facet of the case which is relevant, we would refer to the juror by his number and allude to him at all times in that way.

I have in mind, your Honor, that you have expressed your view that the only jurors with which we have concern in this hearing are the jurors who actually sat on the case, the alternates and those jurors who were excused from sitting on this case after being called for potential jury service. It seems to me that we could perhaps make that inquiry with respect to them by a system of numerical identification.

The Court: Who is going to do the identifying?

Mr. Williams: Well, I think somebody—

The Court: Does it come to this: that you [1035] want the names of all those people and you want whatever data with respect to them appears on this list, and that this purpose of identification by number is merely for the purpose of the record so as to prevent public disclosure; is that what you are getting at?

Mr. Williams: I think that is accurate, your Honor?

The Court: I see. I will think about that and maybe Mr. Christy might have some views on it. I certainly won't rule on it now.

Mr. Christy: Your Honor, I would object to any further testimony or any numbering of these jurors because once Mr. Williams has established that there was a classification, anything beyond that is going to get into the operation of the Assistant United States Attorney's mind to perform it, and I can't see that it is relevant or that it should be per-

mitted to be discussed either in open court or under the numerical system.

The law provides that the Government and the defense are entitled to peremptory challenges. That is part of the law on the selection of a jury, and whether or not we exercised our peremptory challenges for some particular reason it seems to me is not relevant [1036] at this hearing.

The Court: Well, all right. You can both argue fully later on but we will have to give some thought to it. I have no view one way or the other whether we should do it that way or not. Maybe it would be a good time to adjourn now.

I think counsel and the parties interested in this other motion that I have set for 12:30 are here and we could adjourn now.

Was it your idea that this should be made available to you at once or do you now prefer merely to get the part of the transcript available? I take it the defendant has his own copy of the transcript.

Mr. Shilensky: No, your Honor, we haven't been able to find our copy as yet. That was because it was not printed and somehow or other the portion of it—

The Court: You got daily copy?

Mr. Shilensky: I imagine we had it at that time but we haven't been able to find our copy because it may be in Mr. Fennelly's office or Mr. Lane's office, and he is in Washington. We haven't been able to locate it.

The Court's copy or the file copy is the only [1037] one available today.

The Court: All right.

Mr. Kiviat, will you notify the clerk that we want that.

Have you seen it in the court file?

Mr. Shilensky: Yes. I segregated it.

The Court: It is only a matter of producing it.

Mr. Shilensky: It is a matter of asking the custodian, the clerk in room 507, to send it up here.

The Court: Will you do that, Mr. Kiviat, and have it up here at 2:15.

The Clerk: Yes.

Mr. Christy: May I approach the bench a minute, your Honor, with Mr. Williams?

(Discusion off the record at the bench.)

The Court: The motion in U. S. against Costello is adjourned until 10:30 tomorrow morning.

(Adjourned to October 15, 1957, at 10:30 a.m.)

[1038] New York, October 15, 1957; 10:30 o'clock a.m.

(Hearing resumed.)

Mr. Williams: I believe Mr. Leath was on the stand, your Honor, when we concluded.

The Court: Very well.

WILFRED T. LEATH, resumed.

Direct examination (continued) *by Mr. Williams:*

Q. Yesterday at the end of the session when you were under examination I asked you whether there were any other records made by the Bureau of Internal Revenue concerning the inspection of the tax returns of the persons who sat on the April jury panel and you asked me if I was talking about the entire panel, and I said yes, and you answered that there was one record which was in existence which would indicate the returns that were pulled in Albany? A. Yes, sir.

Mr. Christy: Not that were pulled; that [1039] were requested.

The Witness: That were requested, yes.

Q. That were requested to be pulled. A. Yes.

Mr. Williams: I accept Mr. Christy's modification.

Q. Now, I want to ask you the question, Mr. Leath: Were any records made concerning the income tax inspection of the returns of the jurors themselves who sat in this case? A. I don't believe I quite understand. You mean—

The Court: Well, there came a time when twelve people were picked to sit as jurors and then certain other people were picked to sit as alternates, and I think, Mr. Christy, you said there were three alternates.

Mr. Christy: That is correct, your Honor.

The Court: I understand Mr. Williams' question to be, when that group of people totaling fifteen had been determined, was there any investigation made of the returns of those fifteen people. Is that the question?

Mr. Williams: Yes.

The Witness: Not to my knowledg Mr. Williams

[1040] Q. Well, are there any records, Mr. Leath, in existence concerning the inspection of the returns of those persons, whenever it may have taken place, who actually sat as jurors or as alternate jurors in this case? A. Well I couldn't answer that, Mr. Williams, because there may have been an examination of those particular peoples returns entirely independent of this case, that is, returns may have been assigned for examination in the regular course

of business. That I wouldn't know because we don't handle that particular—

Q. I am only asking about—

The Court: Well, do you mind if I interrupt here a moment?

Mr. Williams: No.

By the Court:

Q. As I understand the crux of Mr. Williams' question is this: The testimony so far is that of those names that appear on the panel, 360 I believe approximately 150 returns were found, returns for 150 people of those 360. And what Mr. Geissler and I think Mr. Murphy call an inspection rather than an investigation was made of each of those [1041] 150 returns. A. Yes, sir.

Q. And I think there was testimony that some notations were made by Mr. Geissler on each of the returns he made. Now what Mr. Williams is asking is were any of the notations based on those inspections, or are any of the notations based on those inspections now in existence with respect to any or all of the persons who actually comprised the twelve jurors and three alternates?

Mr. Williams: Yes, sir.

A. Not to my knowledge, Mr. Williams.

By Mr. Williams:

Q. You haven't seen any such? A. No, sir.

Q. Notes on the actual jury itself? A. No, sir.

Mr. Williams: Your Honor, overnight we had access to the transcript of the voir dire in this case and we have now—

The Court: Just a moment, please. Yes, excuse me.

Mr. Williams: And we have now, your Honor, a list of the jurors who did sit and we have as a [1042] result of an analysis of the voir dire a list of those jurors who were excused from sitting after having been called, and I think we have reached that posture of this examinaton, your Honor, or this stage of the case where we need whatever information we can get from what has been designated Court's Exhibit No. 2, but before reaching that, your Honor, yesterday counsel for the Government indicated he would bring to court one other record which is in existence according to the testimony concerning the inspection of returns, namely, the request made of the Collector in Albany for the pulling of the returns of those jurors who actually made returns in that district.

The Court: Very well.

Mr. Christy: Your Honor, I have such a document, which is a memorandum to the Regional Commissioner here with regard to certain returns (handing to Court).

[1043] The Court: Let the record show that Mr. Christy has handed to the Court five sheets of paper, the first of which is a communication over the name of W. T. Leath to the Assistant Regional Commissioner, the Intelligence Division, New York, under date of March 11, 1954, and the remaining pages bearing the names of 170 persons.

Now, do you have any objection to making this available?

Mr. Christy: Yes, I do, your Honor.

The Court: Do you object to making it all available?

Mr. Christy: I object to making it all available. I turned it over to the Court on the direction of the

Court but I would resist its production or showing to Mr. Williams. This is—

The Court: I say all of it, because we could get down to the meat of the thing. Do you have any objection to showing the covering memorandum which I have described as the first page?

Suppose you look at that again and see if you have any objection to that. I take it you would object to the list of names for the same reasons that were the grounds of your objection to the disclosing of [1044] the list of potential jurors.

Mr. Christy: That is right, your Honor.

The Court: But look at that first page and see if there is any objection to showing that.

(Mr. Christy examines document.)

Mr. Christy: I would object to turning this over, your Honor. This is a confidential communication between members—

The Court: That may be, but hasn't it been testified to by Mr. Murphy and Mr. Leath? Is there anything in there that hasn't already been testified to?

Mr. Christy: The substance of it has been testified to, your Honor. Therefore, I see no purpose in turning it over to Mr. Williams.

The Court: I disagree with you on that. I am going to make the first page available but I will not make the names available for the very same reasons that I sustained the objection to turning over the list of the jurors, that is, the list that you had in your file.

You need not remove that. You can leave it right where it is. If you have a photostatic copy of it—

Mr. Christy: I have, your Honor.

[1045] The Court: —you can make the photostatic copy available to Mr. Williams. Turn that copy over to Mr. Williams.

(Mr. Christy hands to Mr. Williams.)

The Court: Let the record show now that Mr. Christy has handed to Mr. Williams a photostat of the first page of this group of pages which he has just given me and that first page is a copy of the memorandum over Mr. Leath's signature concerning which he testified yesterday in which the request was made that the returns be pulled of 170—I think that shows—persons, whose residence indicated that the place for their filing of income tax returns would be the Albany district.

Mr. Christy: One thing, your Honor. I think Mr. Leath testified it was not over his signature.

The Court: Over his name. That is right, he did. He testified that, while his name was signed to it, he did not sign it, and he explained the circumstances under which it came to be sent out over his name.

Now, with respect to the balance of it, if you will let me have it, I will mark this Court's Exhibit [1046] 3. I shall not make it available to you, Mr. Williams, at this time, and maybe not at any time but certainly not now, for the same reasons that I denied access to the copy of the jury panel list from the files of the United States Attorney.

You will take these and mark that Court's Exhibit 3.

(Court's Exhibit 3 marked for identification.)

Mr. Williams: Your Honor, I understand you have ruled on this matter. I did hope to have the opportunity to point out what I conceive to be the difference between that list and the jury panel.

The Court: Very well. I did not mean to foreclose you from that and I withdraw my ruling now, declining to let you have it, and I will hear what you have to say on it. You may be able to persuade me there is a difference.

Wilfred T. Leath—for Defendant—Direct

Mr. Williams: My thought on it is this, your Honor. As I understand the theory behind the ruling that Court's Exhibit No. 2 should not at this time be made available to the defendant, it is that the Court wants to obviate the possibility of embarrassment to those persons whose names appear on [1047] Court's Exhibit 2 with a classification beside their name.

Your Honor, the testimony, as I recall it, to date has been that a request was made of the collectors in three districts for inspection of the returns of all the persons whose names appear on the April jury panel. Those names, as I understand the practice, are a matter of public record. There is no concealment of the persons who sat on the panel in April, 1954. So that already the testimony is to the effect, as I understand it, that all persons who sat on the panel in April of 1954 were subjected to this inspection.

Now, my further understanding, your Honor, of Court's—

The Court: My recollection is quite different, Mr. Williams. My recollection is that there was a request made that they all be examined but that the total number of persons concerning whom the request was made is 360 and that of that number only 150 returns were found. You agree that that is the statement of the testimony?

Mr. Williams: I think there is a conflict in it, if I may point it out, your Honor.

[1048] Mr. McMahon said he made a request for all the returns to be inspected of the April, 1954, panel, and he said further, in response to a question I put to him, that in so far as he knows all of those returns were inspected save for those persons who did not file income tax returns.

Wilfred T. Leath—for Defendant—Direct

Now, your Honor—

The Court: Is that inconsistent, do you believe, with Geissler's testimony, the man who actually inspected the returns and whose testimony is that the total of the returns made available to him was only 150?

Mr. Williams: I think it is inconsistent, your Honor, because it is inherently incredible that only 150 out of 360 persons would have even filed a return who sat on that jury panel, and then when you couple that with Mr. McMahon's testimony that he had no record on his classification sheet of anyone's not having filed a return, that there is a basis for inference at least that there were more than 150 returns inspected and that Mr. Geissler's recollection on that subject is perhaps hazy.

The Court: Well, you see an inherent incredibility in it. At the moment I do not.

[1049] Mr. Williams: Coming back to the thrust of my argument at this time, your Honor, I don't see any possible embarrassment that could flow to any of the persons whose names appear on what has now been given the designation of Court's Exhibit 3, because, as I understand that exhibit, there are no classifications of those persons, there are no indicia on that sheet which would reflect in any way on the favorability or unfavorability as to those persons for jury service from the Government's point of view.

So I don't think the same argument pertains with respect to this latter listing which holds for the Court's Exhibit No. 2.

The Court: That may be. As I ran through those pages, I saw no indication of any classification on here, but the presence of classification on the list that came from the United States Attorney's office was

not the sole reason why I denied you the right to have that particular list.

I indicated from the very beginning that the reason why I was not going to allow you to go into this question of naming the names of persons whose returns were examined and the question of the reason why they were excluded was, if any were excluded [1050] from jury service either by challenge for cause or peremptory challenge, it might involve embarrassment to those people. I am going to restrict you to some extent. I may not have to, but, if you attempt to go into it too far, I will do whatever I can to protect each one of those taxpayers—each one of those citizens from any embarrassment that I think might come, and it is going to be probably a difficult job to accommodate the conflicting rights here, to see that you get the fullest opportunity to determine whether or not a jury that was biased or unfairly or improperly or illegally constituted to try this defendant—I am going to try to give you the fullest opportunity to try to develop that, at the same time protecting any juror from any embarrassment that might arise from it. That is the kind of a problem I am going to have to solve step by step.

Now at the moment I am not persuaded that anything you said requires that the list now marked Court's Exhibit 3 for identification be turned over to you and I now make the ruling I made before you made your argument, namely, that you may not have it, but I shall seal it and, if the results of this hearing are such that an appeal is necessary and allowed [1051] and taken, it will be available for review by any reviewing court.

Mr. Williams: May I have this sheet, which is a photostat of Agent Leath's request of the Albany

collector for inspection of the returns, marked as Defendant's Exhibit P for identification?

(Defendant's Exhibit P marked for identification.)

[1052] Q. I hand you, Mr. Leath, what has just been marked as Defendant's P for identification and ask you if that is a true photostat of the letter which was sent to Albany requesting the pulling of returns of certain members of the April Jury panel? A. Yes, sir.

Q. April, 1954, jury panel? A. Yes, sir.

Q. And that appears over your name, does it? A. Yes, sir.

Q. But I understand not your signature? A. That is right, sir.

Q. Who was it if you can tell who signed your name to that? A. That would be the initials of my group chief at that time, Thomas Quirk.

Q. Thomas Quirk? A. Yes, sir.

Q. And in this letter you do request the making available of returns of the persons who names were attached to this exhibit when it was sent to the Collector, right? A. Well, sir, the letter states that but I didn't [1053] actually do it, as I explained yesterday.

Mr. Williams: Your Honor, may we have for the record the number of names which were annexed to that?

The Court: By all means, yes. 170.

Q. Is that your best recollection, Mr. Leath, that there were 170 names annexed to this?

The Court: You may look at the original, Mr. Leath, which is now marked Court's Exhibit 3 for identification.

The Witness: Yes, sir. 170.

Mr. Williams: Your Honor, in the light of your Honor's ruling and in an effort to comply with the letter and spirit of it I would like to ask your Honor if I may now ask this witness if the person, whom I shall not refer to by name but whom I shall refer to as Juror No. 1, appears on Court's Exhibit 2 and what classification was given to him?

The Court: Well, why don't you give us the list of jurors you have and the list of those who were excused either by the Court on some challenge—I have no recollection now of what occurred in the drawing of the jury. I suppose some were excused peremptory by either side. It may very well be [1054] that some were excused for cause. I don't recall.

Mr. Williams: I have such a list, your Honor, but I am embarrassed to tell you that it is in rough pencil notes because we did it up last night. I haven't it in typed form but I can readily translate into typed form today.

The Court: Well, can you go on to something else then?

Mr. Williams: I can go on to this if your Honor will allow me to use this form.

The Court: I think if you are going to work from anything like that that the Government ought to have a copy of what you are working from and I ought to have a copy of what you are working from, because I don't know how we can all look at the same list at the same time.

Will you tell me what it is you are looking for? Is it, for instance, to find out whether or not any excused juror was one of those whose returns were examined?

Mr. Williams: I want to find out, your Honor, what classification was given by Government counsel to the people who sat in this case. I would like to find out what classification was given by Government [1055] counsel to those jurors against whom peremptory challenges were exercised by the Government.

I would like to find out, your Honor, what the classification of the jurors who were excused by the defense were, without the benefit of these names. I don't know any way to do it to comply with your Honor's ruling other than to do it by referring to them by number, but I don't have any number unfortunately, your Honor, on those who were excused. So we get into that problem.

Now I suppose your Honor's ruling embraced not only the people who were on the list and who were never called, but I assume it embraced the names of the persons who actually were called for jury service in so far as identification by name goes.

The Court: Well, doesn't the transcript show the names of each person whose name was called out of the drum?

Mr. Williams: Yes.

The Court: I suppose it wouldn't contain the names of any of the persons who when the panel was called to come to court presented excuses and were excused before the jury was drawn. Now with respect to them I take it that it makes no difference [1056] because no matter what was done with them they had nothing to do with the case and had no chance to serve on the case because they were excused before any name was drawn out of the drum.

So really what we come down to is that there were a total of X number called by having their names picked by the Clerk out of the jury drum, and

that it would seem to me would be the total number of persons in whom wou have any proper interest to inquire about.

Mr. Williams: The only other interest I would have, your Honor, which I think would be a legitimate interest is to know how many persons were classified 1, how many 2, how many 3, how many 4, so we know the exclusiveness of the classification with respect to those various categories. In other words, I think it is germane for us to know whether 50 people—

The Court: That may be so. What bearing it had on the jury I don't know. I think it may be so.

What do you say about that, Mr. Christy?

Mr. Christy: Your Honor, as I understand Mr. Williams, what he wants now is to find out how [1057] we classified the jury basically. Now, your Honor, I am going to vigorously protest any further testimony along these lines. The classification of the jury was the operation of the mind of the Assistant United States Attorney who did it. We don't know the reasons why he did it.

The Court: Well, excuse me a moment, please, Mr. Christy. I just don't understand. You think because you assert that it is the operation of a man's mind that puts a sanctity around it which prevents inquiry? Now that might be so if the man who did it is no longer in existence, but it is precisely that that the defendant is complaining about here. He says whether it was by the operation of the mind of one man or the consensus of opinion of a group of men, that the net result was the creation of a specially conditioned group of people from whom the jury was drawn and that that—the claim now is —I am not making a finding; I am stating what I

understand Mr. Williams' claim to be: And that by reason of that this defendant was denied a fair trial.

Now whether he is correct in that contention or not we are not now considering. But you take the [1058] position that because you assert that whatever was done was the operation of some man's mind, an Assistant United States Attorney, that that prevents it forever from being inquired about, and it may be that you are right, but at the moment I just don't see that point, and I wonder what authority you have for it.

Mr. Christy: Well, your Honor, I want to continue: There has been testimony that the classification was for the purpose of making a note of those persons whom the Government might want to challenge peremptorily. Now the law provides that both the defendant and the Government shall exercise peremptory challenges if they wish.

Now what Mr. Williams is going into now, it seems to me, is the basis for the exercise of the Government's peremptory challenges, and I say I don't see that he has any right to inquire into the basis for peremptory challenges.

The Court: The question as I understand, Mr. Williams—of course, I—on a peremptory challenge you can excuse for any reason or no reason.

[1059] Mr. Christy: That is correct.

The Court: Any lawyer whoever tried a case knows that. You can excuse a juror because you don't like the way he parted his hair or because he doesn't have hair or because he has too much hair, or any other reason, however silly it may seem to us. You can excuse a juror for anything, but he is trying to find out something much more than that.

Now maybe I am doing him a disservice by explaining to you any further what I think his thrust is.

Mr. Christy. Well, if I understand his thrust, your Honor, he wants to find out what we use to classify a juror and I say that he is not entitled to have that; that it was done for the purpose of a peremptory challenge, and he has no right to inquire into the basis for whatever peremptory challenges we may have made.

The Court: Well, I disagree with you on that. I think probably I had better not further explain what I conceive to be Mr. Williams' point here. To me the point of it, Mr. Christy, is so obvious, that I just don't understand the difficulty [1069] that you appear to have in seeing it.

Mr. Williams: I think this colloquy arose in the form originally of an objection to a question. Actually I was seeking guidance from the Court as to whether I might ask of this witness what classification an actual juror had on the list which has been identified here in court, and that was presenting certain problems which we were spelling out when Mr. Christy rose to this point.

Mr. Christy: May I also point out to the Court that there has been testimony that the classification was not based solely on any information which came from an inspection of the tax returns. The person who classified these jurors had available other information.

The Court: Yes, but, Mr. Christy, the testimony of one side never settles an issue.

Mr. Christy: I understand, your Honor.

The Court: Well, are you contending seriously, Mr. Christy, that it is not appropriate for a defendant to challenge the legality of the manner in which a jury was selected?

Mr. Christy: Well, he can challenge it, your Honor--

[1060-A] The Court: Well, do you contend, if you admit that he can challenge it, do you contend when he makes the challenge, if the Government says there is nothing to the challenge, that that ends the proceeding?

[1061] The Court: Well, then, how far do you think he may go?

Mr. Christy: He may, as I understand it, challenge the jury and he may try to show that the jury which was picked was a partial jury; that he did not get a fair trial because his constitutional rights were violated.

The Court: Now, how far, in following that up, do you think he may go and to what extent shall he be foreclosed when the situation is as it is here, that he must get the evidence from hostile witnessess?

Mr. Christy: Your Honor, I am not going to suggest ways in which he might try to prove—

The Court: I am not asking you to suggest that. I am asking you to suggest how far you think he may go. You can't have it both ways, Mr. Christy. You apparently have a basis for your objection. If you want to explain the objection to me, maybe it will enlighten me for a ruling, but you vigorously protest here that I am making wrong rulings by allowing this inquiry to go any further because you say it involves the operation of a man's mind. If the operation of a man's mind was motivated or put into operation by factors which he had no right to consider and, if [1062] the result of that operation brought about the constitution of a jury illegally impaneled, what difference does it make that it was the operation of the mind if the end result was wrong? That is exactly what Mr. Williams is trying to find out, just what did happen here. He thinks he is going to be able to prove that the end result was a violation of the defendant's rights.

He may succeed and he may not, but certainly he cannot be stopped, as I understand it, at the threshold of the inquiry and he cannot be stopped at any midpoint short of his target.

Now, the only reason that I have imposed restrictions here was because of the suggestion you offered and I thought it was well based and appropriate that embarrassment be spared to these people, but you must bear in mind the testimony.

Maybe, I am wrong, but the testimony is by Mr. Murphy in answer to a question by Mr. Williams, who asked him: was the purpose of the classification to indicate those who it was thought or expected would be more favorable to the Government. And Mr. Murphy's answer, as I recall it, was that the classification was done by numbers, 1, 2, 3, 4, and [1063] that the lower the number—and I am sure I am right in this—

Mr. Christy: That is right, your Honor.

The Court: —the more favorable to the Government. That is the testimony so far.

Now, in the light of that statement it is pretty hard for me to find the basis for your objection if the Government was looking for favorable jurors.

Mr. Pierpoint's testimony, on the other hand, was different. Mr. Pierpoint's testimony was that he understood the purpose of the inquiry and classification to be to ascertain whether or not there were any persons on the panel who for one reason or another might have had a reason to be biased against the Government and with the type of juror that in a tax case would be inclined to ignore the Government's evidence and bring in a verdict of not guilty regardless of the evidence.

Now, you have those two quite opposite statements as to what the purpose was, and in that state

of the record it seems to me that it is certainly open to Mr. Williams to find out just what the fact is. Mr. Williams contends that the whole purpose of this classification was to get a jury that was a convicting [1064] jury—he described it as a blue ribbon jury and I think that is what he meant by it.

In any event, I ruled on that and I am going to allow it to be gone into to whatever extent is necessary consistent with the protection from embarrassment of any juror, any person who was on the jury panel or any person who was called and excused, whether for cause or without cause, peremptorily.

Mr. Williams. Your Honor—

The Court: Your suggestion is that we can do this by numbers?

Mr. Williams: Yes, sir.

The Court: I am inclined to doubt that. What is running through my mind now is whether or not it is feasible for the Court to do something like this: to indicate that of the total number of persons on the panel, that is, the 360 that were on the panel, the number that were classified in the various classifications and then to examine all those who were actually put in the box, in the jury box, and then compute how many of the various classifications were in that group and then separate them as to those who actually sat, those who were excused.

I don't know whether that would satisfy you. [1065] I am sure it wouldn't completely satisfy you, Mr. Williams, but it seems to me that it would furnish you with all that you could possibly have short of the full disclosure which I fear might result improperly in embarrassment to jurors or prospective jurors.

Do you want to give some thought to that with your associates and see how that works out? And

maybe you have an improvement to suggest or modification of some kind.

Mr. Williams: Would your Honor indulge us just a moment?

The Court: Yes, sir. We will take a short recess so that you may do it.

Incidentally, in any event, I must say to you we are going to adjourn at 12:30 today because I have got another motion that has just been referred to me that I think I can dispose of quickly for the benefit of the litigants in that case at 12:30. But we will take a short recess now and then come back.

(Short recess.)

[1066] The Court: Yes.

Mr. Williams: Your Honor, we are having the list typed up for you. In response to the last inquiry that the Court made I simply want to say this most respectfully to your Honor: Of course, I want to reserve the position that I think I impressed upon your Honor that I think we are entitled to the list itself.

The Court: Oh, yes.

Mr. Williams: And we need it to cross-examine the witnesses who have gone on heretofore on this subject, but, of course, I wanted to get as much information on that subject as I can, and your Honor was suggesting an avenue through which I can get some, and we want to do everything we can to get this particular information, and I am having the list typed up now for Mr. Christy and for your Honor, and I think I could go on with a very short line of proof while that is being done, your Honor, and we will probably conclude.

The Court: Very well.

Leo C. Fennelly—for Defendant—Direct

[1067] LEO C. FENNELLY, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Will you state your address, please, Mr. Fennelly? A. 1165 Park Avenue.

Q. And are you a lawyer practicing law in the City of New York? A. Yes, sir.

Q. How long have you practiced in the City of New York, Mr. Fennelly? A. Since 1922.

Q. And you are a member of the Bar of this Court, are you, sir? A. That is right.

Q. Mr. Fennelly, directing your attention to the year 1954, were you counsel of record in the case of United States v. Costello, No. C. 141-9? A. Yes, sir.

Q. And did you actively try that case for the defendant? A. I did.

Q. Mr. Fennelly, did you know at any time before [1068] trial, during trial or until these motion papers which are now being argued and heard were filed that Bureau of Internal Revenue agents had access to the wire-tap information in Mr. Hogan's office? A. I did not.

Q. Did you know at any time that a mail cover had been put on Mr. Costello? A. I did not.

Q. Did you know at the time of the trial or at any time until it came out in this hearing that the income tax returns of the jury panel of this court for April 1954 had been, or that a request had been made for inspection of them by the Bureau of Internal Revenue agents? A. No, I did not know that.

Q. You had no information concerning the inspection of prospective jurors' returns? A. None whatsoever.

Mr. Williams: You may examine.

Leo C. Fennelly—for Defendant—Cross

Cross examination by Mr. Christy:

Q. Mr. Fennelly, you were at one time, were you not, an Assistant United States Attorney in the Southern District of New York? A. I was.

[1069] Q. And when was that, sir? A. 1934 to 1939. Then I was a Special Assistant to the Attorney General in Washington and operated out of this Courthouse.

Q. All during that period? A. Two years. For two years after 1939 until say 1941.

Q. So your service ran up until 1941, is that correct, sir? A. 1940 and 1941.

Q. During the time you were an assistant you tried a number of cases for the Government, did you not? A. Yes.

Q. And as an assistant you knew that the jury panel lists were published and available to counsel for the defendant and for the Government about a month before trial was scheduled? A. Yes, I would say so.

Q. And you knew that prior to trial the Government occasionally classified a jury panel according to information which was available to it, did you not? A. I don't recall any jury panel ever being classified.

[1070] Q. In any of the cases you tried? A. No. I certainly, I never classified any.

Q. Well, you would take a look at the jury panel before trial, wouldn't you? A. I have a recollection of doing that in but one case and that was in the Harriman trial in 1934.

Q. And you may have discussed with your assistants or superiors certain of the jurors on the panel on the basis of information which was available to the Government? A. I don't ever recall doing that.

[1071] Q. But you knew these lists were available? A. The lists, yes.

Q. And you had a jury panel list for the Costello trial, did you not? A. I don't believe so. I have no present recollection of it.

Q. You knew it was available to you if you wanted it? A. They are available at some period before the trial. The exact date I couldn't tell you.

Q. At the voir dire examination, Mr. Fennelly, you made no request for any information from the Government with regard to the jury panel, did you? A. No, none that I recall.

Q. Mr. Fennelly, at the time of the trial in April, '54 you were aware, were you not, that Costello's telephone had been tapped by the New York State District Attorney's office in the early '40s? A. I think that that was developed at the Kefauver investigation, if I recall reading about it in the press.

Q. You recall the Kefauver investigations? A. Reading about it in the press. I never attended and had nothing to do with it.

[1072] Q. And you recall accounts in the press, do you not, of wiretapped conversations of Costello as reported in the Kefauver hearings? A. I wouldn't say that I have a vague recollection that that was in the newspaper, that such a thing had happened. I had never represented Mr. Costello before the trial and therefore had nothing to do with the subject matter.

Q. During the course of the trial you were associated with Joseph Delaney, were you not? A. Joseph Delaney sat in on the trial. He was handling a civil tax matter for Mr. Costello.

Q. He sat in the courtroom during the course of the trial? A. That's right.

Q. And you conferred with him prior to the trial, did you not? A. Yes, on some matters.

Q. He was also an Assistant U. S. Attorney in the Southern District of New York, was he not? A. Yes.

Q. Mr. Delaney sat with you at this counsel table from the beginning of the trial right through to the end, did he not? [1073] A. That's right.

Mr. Christy: I have no further questions, your Honor.

Mr. Williams: That is all I have, your Honor.

The Court: Very well.

(Witness excused.)

Mr. Williams: Mr. Costello.

FRANK COSTELLO, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Costello? A. 115 Central Park West, New York City.

Q. How long have you lived there? A. Oh, about 20 years.

Q. Were you the defendant in a criminal tax case tried in this court in April of 1954 captioned United States v. Frank Costello, No. C. 141-9? A. Yes, sir.

Q. At the time of that trial, Mr. Costello, did you know that wiretaps on your telephone had been made available to the Bureau of Internal Revenue agents? A. No, sir.

[1074] Q. When was it that this suggestion first came to you? A. Well, I believe it come to me through you when I was in West Street.

Q. Can you fix that in time for us, Mr. Costello, approximately? A. Last October; September or October or something.

Q. Of which year? A. Of 1957.

Q. Well, this is— A. '56.

Q. '56. At any time were you aware of the fact that there was a mail cover or a mail watch on your mail being received either at Central Park West, 115 Central Park West, or at Sands Point? A. No, sir.

Q. When did you first hear of that? A. I heard it in the courtroom for the first time by a witness.

The Court: You mean in this hearing?
The Witness: Not in this particular hearing.
The Court: Back in June?
The Witness: In June.

[1075] *By Mr. Williams:*

Q. Mr. Costello, were you aware at any time that income tax returns of prospective jurors in your case were examined by agents of the Bureau of Internal Revenue? A. No, sir.

Q. When did you learn about that for the first time? A. In this hearing.

Q. In this hearing? A. That's right.

Q. Last week? A. That's right.

Q. Approximately how much mail—I just want to strike an average here—did you receive per week in the years 1950, '51, '52? A. Well, I would say an average of about 40 letters a week. That would include Mrs. Costello's mail.

Q. When you heard of the mail watch, was that after the witness Bolich testified here, and I called it to the attention of the Court? A. That was my first—

Q. Is that the first time you heard it? [1076] A. The first time, yes.

Q. Did you know what a mail cover was before that? A. No.

Mr. Williams: I have no further questions.

Mr. Christy: May I have just a minute, your Honor?

The Court: Yes.

(Pause.)

Mr. Williams: I will ask one question, if I may, your Honor, that I overlooked.

By Mr. Williams:

Q. Did you knew at any time, Mr. Costello, that the Hogan office—and by that I mean the office of the District Attorney for New York County—had intercepted telephone calls over your wire? A. Yes.

By the Court:

Q. And you knew that in 1954 at the time of the trial? A. In substance I knew it was done in '43.

Q. But at the time, at the time of trial, you knew that there had been taps on your telephone at some prior time? [1077] A. That was my recollection through the Aurelio hearing.

Mr. Williams: Your Honor, I overlooked one other question. I am sorry about this.

The Court: All right.

By Mr. Williams:

Q. Did you find out about 1925 wiretaps during your immigration case? A. No.

Q. I say in 1956— A. Oh, yes.

Q. Before Judge Palmieri? A. Yes, sir.

Q. In 1956 there was a trial held; is that correct? A. I thought you meant did I know it in 1925.

The Court: The testimony is, then, that in 1956 you learned that there had been taps back in 1925 but you say you did not know they were there in 1925?

The Witness: No, I knew it prior to that but I didn't know it in '25.

Cross-examination by Mr. Christy:

Q. Mr. Witness, you knew in 1943 that your telephone had been tapped by the New York County District [1078] Attorney's office, did you not? A. Well, I learned of it at the hearing.

Q. At the Aurelio hearings? A. Yes, sir.

Q. It was carried in the press, was it not, to a great extent? A. At the time, yes.

Q. And you knew in 1951 that your telephone had been tapped by the New York County District Attorney's office, didn't you? A. Did I know it in '51?

Q. That your phone was being tapped in 1950. A. No.

Q. At the Kefauver hearings you were represented by George Wolf, were you not? A. Yes, sir.

Q. And during those hearings there were references to wiretaps, were there not? A. I believe there was.

Q. And you recall Mr. Wolf objecting to the use of 1943, 1946 and 1950 wiretaps at the hearing, don't you? A. No, I don't recall that. I recall he objected to the 1943 wiretaps.

[1079] Q. Didn't he also object to the 1950 tap? A. Not to my recollection.

Q. But he knew obviously about the 1943 tap, though? A. Yes, sir.

Q. And prior to your trial here in 1954 for income tax evasion you conferred with George Wolf, did you not? A. On what subject?

Q. About the trial? A. Prior to 1954?

Q. Yes. A. I think I had some conversations with him, yes.

Frank Costello—Defendant—Cross

Q. Mr. Witness, in your affidav. filed in this court in connection with this motion which was dated November 28, 1956, and I will show it to you (showing to witness) you state on the second page that before and during the trial you held conferences on the telephone with your counsel Delaney, Fennelly and Wolf concerning the preparation and presentation of your defense and you said that you now have information and belief that those conversations were intercepted. The basis for your statement there is information that you gained from your [1080] attorney Mr. Williams, is it not? A. Yes.

Q. That was the only basis for your statement? A. The only basis.

Q. You never at any time reported to the post office that any of your mail was being delayed, did you? A. Never.

Mr. Christy: No further questions, your Honor.

Mr. Williams: Would you mark this, Mr. Clerk, please, Defendant's Exhibit Q for identification?

(Marked Defendant's Exhibit Q for identification.)

Mr. Williams: Your Honor, at this time I am offering this, which I think your Honor can take judicial notice of, examination on the voir dire of the jury panel at the trial of this case.

Mr. Christy: No objection, your Honor.

(Defendant's Exhibit Q for identification received in evidence.)

Mr. Williams: Your Honor, we have subpoenaed from Mr. Hogan's office the grand jury testimony of the defendant Costello given on October 13th and 20th, [1081] 1943, plus the Court order authorizing the transfer of that testimony to the United States Attorney's office, but Mr. Scotti in Mr. Hogan's office tells us on the phone that that is still

the position of the United States Attorney's office. Mr. Christy's information is that it was returned to Mr. Scotti's office. It becomes germane here, your Honor, because it is testimony of the defendant in 1943 turned over to the United States Attorney's office pursuant to Court order which is in fact replete with wiretaps.

Now, I don't have for the reasons which I just explained to the Court the actual certified copy of that transcript but I do have at hand a copy of the grand jury minutes which were certified to by the United States Attorney in connection with another case and it may be that Mr. Christy will agree that this is an accurate transcript of that testimony and we can offer it.

The Court: What is the other case?

Mr. Williams: It was in the—

The Court: The Immigration case?

Mr. Williams: Yes, sir. It is my understanding, your Honor, that Mr. Christy will correct me [1082] if I am in error, that the Government will stipulate that this grand jury testimony was sent to it, to Mr. MacMahon prior to this case.

The Court: Prior to the tax case.

Mr. Christy: Your Honor, I was unable to put my hands on a copy of the order requesting the grand jury minutes, prior to the tax trial in 1954, but I will stipulate for the record that we made such a request and an order was granted, and my recollection is, and I am quite certain I am right, that the order was signed on April 2, 1954, three days before trial. I will double check that during the recess but I think that that is the date, and that a copy of the grand jury minutes was made available to the United States Attorney's office.

The Court: And this was the grand jury testimony taken in 1943?

Mr. Christy: This was the testimony of Frank Costello before the second September—

The Court: Well, it is 1943.

Mr. Christy: 1943.

The Court: That is all we need. The testimony Frank Costello gave before the grand jury in 1943?

[1083] Mr. Christy: Yes.

Mr. Williams: Your Honor, in this particular volume which I hold in hand—

The Court: You say this was April 3rd, the order, as far as you can recall?

Mr. Christy: April 2nd was my recollection, your Honor.

The Court: 1954? That is just a couple of days before the trial.

Mr. Christy: That is correct, your Honor.

The Court: According to the transcript here the trial began on April 5. All right.

Mr. Williams: I think we should mark this, Mr. Clark, Defendant's R for identification, if you will, please.

The Court: Mark the whole volume for identification and whatever the pages are I take it you are going to offer them in evidence.

Mr. Williams: Yes.

(Marked Defendant's Exhibit R for identification.)

The Court: And they will be R-1. What is that? The record on appeal?

Mr. Williams: Yes, sir.

[1084] The Court: This is the record in the Immigration case.

Mr. Williams: Yes.

Your Honor, the pages in Exhibit R which are the grand jury testimony given in 1943 are pages 116 through page 284, and I understand that they are to be marked Defendant's Exhibit R-1.

The Court: That is right, and that is what you are offering in evidence

Mr. Williams: Yes.

The Court: Very well. I take it you have no objection.

Mr. Christy: May I inquire just for the record, your Honor? This is grand jury testimony of Costello in connection with the Aurellio hearing, is that right?

Mr. Williams: Well, it goes into a good many other things.

The Court: Well, what possible difference can it make what hearing it was in connection with. It is being offered here solely for the purpose as I understand it, as the basis for some further argument or further testimony with respect to wiretaps at that time.

[1085] Mr. Williams: Yes, sir.

Mr. Christy: Well, if it were testimony which we had never seen, your Honor, I would have objected to it, but I just wanted to make sure it was the testimony which was the subject of the Court order.

The Court: Well, let me see R. I thought you had gone all through that.

Well, I was mistaken in calling this the record on appeal. R for identification appears to be a document prepared and submitted to the Court of Appeals by the United States Attorney's office and it is designated as the appellant's appendix of Volume I in the Immigration case.

Have you looked at that?

Mr. Christy: I just looked at the cover.

The Court: That is obviously something that emanated from your office. It is a fact, is it not, that after the dismissal in the Immigration case by the District Court the Government took an appeal?

Mr. Christy: That is correct, your Honor.

The Court: And this is the appendix to the Government's brief that was submitted to the Court of Appeals on that appeal.

[1086] Mr. Christy: I presume that is correct.

The Court: Well, now, don't presume. Take a look at it and see. I don't know. I am only reading the cover.

Mr. Christy: I would agree that that is, your Honor.

The Court: All right. Very well. All right, go ahead.

Mr. Christy: Now I will object to its receipt in evidence, your Honor, on the ground that there is no foundation. Mr. Williams has merely shown that this grand jury testimony was available to the Government, but there is no showing that the Government made any use of any of the evidence or testimony in the grand jury minutes for the purpose of the tax trial, and I would take it that if he is offering it that there must be some connection shown between this testimony and any witnesses that were used at the trial.

The Court: Overruled.

(Marked Defendant's Exhibit R-1 in evidence.)

[1087] Mr. Williams: Your Honor, the transcriptions are just about indexed now. We have indexed them in acordance with your Honor's suggestion by flagging them and showing the particular expenditure to which these transcriptions related so it will be very easy for the Court to go through them if necessary. They will be ready, I am told, in about 10 minutes.

May I suggest an adjournment at this time?

The Court: Yes, because I am going to take on that other matter in 10 minutes.

When you talk about the transcriptions, you mean the transcriptions of the intercepted phone calls concerning which the police officers and Mr. Fay testified?

Mr. Williams: Yes.

The Court: We will adjourn now, then, until 2:15.

Mr. Christy: Your Honor, in the interests of saving time the Government would like to take a look at the transcriptions before they are received in evidence or offered in evidence.

The Court: I take it Mr. Williams will make them available to you and, if you have any objections, [1088] take them up with him and maybe you can straighten them out. If not, you can present them to me at some time later in the hearing.

Mr. Christy: Very well.

The Court: This hearing is adjourned until 2:15. I take it, Mr. Williams, you have no objection if I hold this Q for identification, which is the transcript of the voir dire.

Mr. Williams: Yes, sir.

Mr. Shilensky: If your Honor please, that came from the clerk's office along with the court papers. The copy you have is the copy which we got from the clerk's office and belongs to the court.

The Court: So we are all only borrowing it.

Mr. Shilensky: Yes.

The Court: So that there will be no question about the security of this Court's Exhibit 3 for identification, which is the list which was submitted and identified by the witness Leath, I entrust that to your care, Mr. Christy.

You also have Court's Exhibit 2, do you not?

Mr. Christy: Yes, I do, your Honor.

The Court: Very well.

[1089] I have forgotten where Court's Exhibit 1 is.

The Clerk:. You told me to hold on to it.

The Court: That is already received. You hold on to that.

(Recess taken until 2:15 p.m.)

AFTERNOON SESSION—2:30 p. m.

Mr. Williams: Your Honor, I have what I think will be a short witness before giving you this list.

JOHN CYE CHEASTY, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, sir. A. 196 Midwood Street in Brooklyn, New York.

Q. How long have you lived there? A. 17-odd years on and off.

Q. What is your present occupation? A. Assistant Counsel, United States Senate Select Committee on Improper Activities in the field [1090] of labor and management.

Q. How long have you been so employed, Mr. Cheasty? A. February 20th, 1957, sir.

Q. At any time did you serve as a special agent of the Bureau of Internal Revenue and as Treasury Department agent? A. Yes, I did, sir.

Q. When was that? A. I served as Treasury Department Secret Service agent from November 17, 1934 until September 3, 1935 and special agent in the Internal Revenue Intelligence from September 3, 1935 until October 11, 1940.

Q. Did that period with the Treasury Department extend from 1934 to 1940, is that correct? A. That is correct, sir.

Q. In what office did you work while you were so employed? A. In the Internal Revenue Intelligence I worked in the New York Office.

Q. At any time—

The Court: You mean you were in the New York office from 1934 to 1935?

[1091] The Witness: From 1935 to 1940, sir.

The Court: From 1935 to 1940?

The Witness: In the Intelligence Unit.

Q. You were in the New York office from 1935 to 1940? A. Yes, sir.

Q. Where were you in 1934 and 1935? A. Well, I was with the Rackets Squad of the Secret Service. That was under—that was in the United States Secret Service.

Q. Now, at any time while you were in the Bureau of Internal Revenue did you intercept or assist in the interception of any phone calls to which the defendant in this case Frank Costello of New York was a party? A. Would the question, please, be repeated, sir?

(Last question read.)

The Witness: I assisted in the interception of some calls and I understand Mr. Costello was—I don't know whether he was a party to it or not exactly. I don't recall that.

John Cye Cheasty—for Defendant—Direct

Q. Well, let me ask you this, Mr. Cheasty:

With whom were you working when this interception took place? [1092] A. The other special agents?

Q. Yes. A. I was working with Special Agent William Mellin and Special Agent Joe—Joseph Dineen.

By the Court:

Q. Will you tell us when this occurred? A. Well, it was in the fall of the year and it was at or about the time of a fight, a championship fight in New York. It would probably be in 1936 or 1937; maybe 1938.

Q. What fight? You don't remember? You don't know who the fighters were? A. No, I don't remember the contestants, sir.

Q. Was that fight held in New York? A. Yes, sir. Either the Polo Grounds or the Yankee Stadium.

Q. You can't tell what year? That is all you can tell? A. I can tell it was 1936 or 1937, in that bracket there; 1936 or 1937.

The Court: Very well.

By Mr. Williams:

Q. Did you remember, was this a heavyweight championship fight? [1093] A. I am pretty sure it was. It was a big fight. It drew a terrific crowd. Everybody was in town for it.

Q. Was it the time when Joe Louis was champion of the world? A. That's not my best memory, I can't say. I would have to look it up and identify it from a record.

Q. Do you have a record of that, Mr. Cheasty? A. No, I don't have any personal records of that period left at all.

Q. Do you recall where this interception was made? A. Yes, sir, I do.

Q. Where was it? A. At the Hotel New Yorker in New York City.

Q. Were you present when the interception itself was made? A. The bug, the actual tap, no.

Q. When the tap was put on. A. You mean on the bridge?

Q. Yes. A. No.

Q. Do you know who did that? A. Yes, I do.

[1094] Q. Who did that? A. Bill Mellin.

Q. Were you qualified yourself to put a tap on a telephone?

Mr. Christy: Objection, your Honor.

The Court: Overruled.

A. Well, there are no qualifications. If you have a screwdriver and a pair of pliers, you can do it.

Q. Do you know how to do it, or did you then? A. I don't know whether I knew how to do it then. I knew the theory.

The Court: Well, you didn't do it this time?

The Witness: No, I did not do it that time. No sir, I did not.

By Mr. Williams:

Q. Do you recall which room this tap was put on in the Hotel New Yorker? A. It was put on two different rooms. It was put on one room first and then changed and put on another.

Q. Do you have a recollection, sir, as to whose name the room was registered under? A. The first room that we cut in on was Governor [1095] Hoffman's room.

Q. Governor who? A. Hoffman. That was a mistake. They bridged the wrong pair.

Q. Is that Governor Hoffman of New Jersey? A. Yes, sir. We bridged the wrong pair there. Then we had to get hold of Mellin and change it.

Now, my recollection is it was either Room 2200, 2400 or 2700.

Q. Those are the numbers that stick in your mind? A. That sort of stays in my mind and I recall the other number was we were down on the 17th floor. That is the best recollection I have got.

Q. Thereafter whose line did you put the tap on? A. Seymour Weiss.

Q. Is that Seymour Weiss of New Orleans, Louisiana? A. New Orleans, Louisiana, yes, sir.

Q. And was it expected that Costello would talk over that telephone?

Mr. Christy: Objection, your Honor.

The Court: I will allow that line of inquiry if you will reframe that question.

[1096] *By Mr. Williams:*

Q. Did you receive any instructions from your superior prior to putting this tap on? A. Well, I didn't put the tap on. I received instructions, though.

Q. From whom did you receive the instructions? A. Hugh McQuillan and Walter J. Murphy, as I recall.

Q. Walter Murphy? A. Those are the two, as I recall it.

Q. Did you receive instructions concerning whose conversations you were to look for? A. Yes, sir.

Q. What were they?

Mr. Christy: Objection, your Honor, as to what instructions he had about conversations.

The Court: Overruled.

A. Well, it isn't exactly the way you say it, Mr. Williams. The way it happened was this: We were called in and we were told that Si Weiss was coming to New York; that he would have with him Kastel, Phil Kastel, and Frank Costello, and Si Weiss was supposed to be going to Europe and they were going to stay at the New Yorker Hotel.

[1097] My instructions were to hang out there and hold on to whoever it was that would seem to be moving, particularly Si Weiss. I was not to lose him.

Q. Excuse me. When you say "hold on to whoever was moving," do you mean by that to put under surveillance? A. Yes, sir, to maintain a surveillance of.

Q. And by that you mean a visual surveillance; is that correct? A. Yes. And then Bill Mellin would assist us in maintaining the surveillance.

Q. And his assistance was to be in the form of installing a telephone tap on the room which they occupied? A. Well, I don't know what he put in the room, but I know we had an observation station and there was an outlet there, and Joe Dineen manned that and I manned it, and most of the time when I was there there was nothing on the line, it was dead, and I maintained the watch in the lobby.

Q. You maintained what watch in the lobby, Mr. Cheasty? A. Well, the surveillance.

[1098] Q. The visual surveillance? A. The visual surveillance.

Q. Where did you maintain the manning of the telephone tap? A. I can't give you the exact room number. I think it was 1700-and-something. I don't know.

Q. Was it a room near the room which— A. No.

Q. —was being occupied by Costello? A. No. It was several floors removed.

Q. Was this Joseph Dineen whom you have mentioned likewise a Bureau of Internal Revenue agent? A. Special agent, yes, sir.

Q. And Mellin was at that time a special agent of the Bureau of Internal Revenue? A. Yes, sir, he was.

Q. Did anyone other than you, Mellin and Dineen work on this tap, either installing it or listening on it? A. That happened some 20-odd years ago and I don't recall. I remember Dineen and, of course, Mellin, and I know I was there.

Q. For how long was this tap in, if you know? A. The way it happened was this: We got in [1099] on the wrong line to start with, and that had to be changed, and then we got in on Si Weiss' line and then they came down one day—in a couple of days they came down to lunch, a late lunch or breakfast, and they went in the Manhattan Room and they sat down there and they were at a table, the three of them—Costello was one of them and Kastel, as I recall, and Weiss—and who came in and sat next to them but J. Edgar Hoover and Clyde Tolson, and those three fellows, Costello, Kastel and Weiss, hurriedly finished their meal and left there, and shortly after that Dineen told me that they were going to go back, somebody was going back; everything seemed to be off.

So it rained for a while there and, as I recall, either Costello or Kastel and Si Weiss—as I recall, there were two of them—took a plane and I tailed them. They went into the Pennsylvania Station and picked up some plane tickets at a ticket section there and they took a plane from Newark Airport, and at Newark Airport—in the meanwhile I had been in touch with the office. I wired ahead and they were covered at the various stops for that flight. I gave the flight number, and that's it.

Q. I didn't hear the last. [1100] A. I gave the flight number and that was it. I gave it to—

The Court: You mean you were finished?

The Witness: I discontinued the observation, sir.

The Court: Yes, but you have been telling us about the observation and Mr. Williams has been asking you about the tap. I think the question was where the tap was.

Mr. Williams: Yes, sir.

The Witness: It was in Room 1700 or 1700-something-or-other in that building.

[1101] *By the Court*:

Q. Was that done with the cooperation of the hotel?

The Court: What relevance has that to this?

A. I don't think so. I don't know. I am not sure.

Q. Other than you and Dineen, did anyone else actually man the tap? By that I mean listened in on the conversations A. Well, Mellin was just a technician. All he would do is find out if the thing was good and that was it.

By the Court:

Q. But the question is are you able to tell us—you said sometimes you listened in on the tap. A. Yes, and Dineen.

Q. And Dineen. The question is did Mellin or anybody else that you recall? A. I don't think Mellin did.

Q. All right. Did anybody else besides you and Dineen that you recall? A. No, sir, I don't recall anybody else.

The Court: Very well.

The Witness: It is a long while ago.

By Mr. Williams:

Q. That tap, Mr. Cheasty, was in the form of a dictograph, was it not? Do you know what I mean by that term? A. Yes.

Q. Let me spell it out so we will understand each other. It was a tap which picked up not only telephone conversations but also conversation in the room, was it not? A. The only trouble is it didn't pick up much in the room as I recall it.

The Court: Was it an instrument designed—

[1101a] The Witness: It was designed, yes.

The Court: It was capable?

The Witness: It was an open circuit and used the telephone as a microphone.

[1102] Q. In other words, it not only picked up conversations over the telephone but also conversations not over the telephone in the room in which it was placed?

The Court: Well, what the witness said is it was designed to do that but in so far as he can now recall the results were meager with respect to conversations in the room, not over the wire. Is that correct?

The Witness: That is correct, sir.

The Court: All right. Let us get along.

Q. Well, did you hear conversations in the room, not over the phone? A. No; no, sir, I did not.

Q. Now, did you have any information on other taps put in on Costello by any special agent of the Bureau of Internal Revenue?

Mr. Christy: Objection, your Honor, to the form of the question.

The Court: Yes, I will sustain that. You may pursue that inquiry but you had better reframe your question.

Q. To your knowledge did Mellin put any other taps in on Costello?

[1103] Mr. Christy: Now, wait a minute. I object to that.

The Court: Sustained.

By the Court:

Q. Did you participate with Mellin, Dineen or anybody else in installing any other taps on any telephone connected with the defendant Costello? A. No, sir, I did not.

Q. Did you participate in monitoring or listening to any taps that had been put in, whether it was by Mellin, Dineen or anyone else? A. In connection with the defendant Costello?

Q. In connection with Costello. A. No, sir.

The Court: Very well.

By Mr. Williams:

Q. Mr. Cheasty, did you make a report at the time concerning what information you picked up and what you did do during this particular series of events that you described? I mean a report to your superior? A. I know I made telephone reports continually. I do not recall whether I wrote out a report or whether—I don't recall writing out a report.

Q. Were they made, these telephone reports, to [1104] Mr. Walter Murphy? A. Oh, yes, or Mr. Hugh McQuillan, depending on who was there.

Mr. Williams: No further questions.

The Court: Very well.

John Cye Cheasty—for Defendant—Redirect

Cross examination by Mr. Christy:

Q. Mr. Cheasty, this tap installed by Mellin was in a room in which Seymour Weiss, Kastel and Frank Costello was staying, is that right? A. A suite, yes, sir.

Q. A suite of rooms? A. Yes.

Q. And your instructions in this case were in connection with the Seymour Weiss case, is that correct? A. Yes, sir.

Q. Mr. Cheasty, did you actually sit on the tap during the time it was in? A. Yes, sir, I did.

Q. During the time you were sitting on this tap you did not hear any conversations of Frank Costello, did you? A. No, sir, I did not.

Mr. Christy: No further questions.
The Court: Very well.

[1105] *Redirect examination by Mr. Williams:*

Q. Did anyone other than yourself and Dineen listen, to your knowledge, on this line? A. Not that I can recall.

Q. Did Mellin listen on the line? A. Mellin would check the line out for technical—to see that it was in operation, but I don't recall Mellin ever sitting on a line.

Q. How long was the line actually manned in the course of a day? Was it manned during the daylight and evening hours? A. 24 hours.

Q. It was manned 24 hours? A. Yes.

Q. Did you and Dineen man that line 24 hours together? A. Well, the way it worked out was, Dineen, he had it so that it was on his ear, and if he slept he had it rigged so that it would wake him up the minute anybody touched it.

Q. To your knowledge, Mr. Cheasty, were there at that time in the Bureau in which you worked any records concerning taps by the Bureau on Costello?

(Question read at the request of the [1106] witness.)

Mr. Christy: Your Honor, the witness has already testified that he didn't know of any other taps on Costello. So it seems to me he has answered the question.

The Court: Well, he is asking him about any records with respect to taps. I will allow him to answer the question if he knows.

The Wtiness: We didn't keep records of taps as I recall.

The Court: Well, then, answer the question. You were asked whether there were any records kept. Is your answer that no records were kept as far as you know?

The Witness: As far as I know no records were kept.

The Court: Very well.

By Mr. Williams:

Q. Was it the practice of the Bureau at that time deliberately not to keep records of taps, if you know? A. That is not the situation, Mr. Williams.

The Court: Well, if you will just answer the question, Mr. Cheasty. Was it the practice [1107] deliberately not to keep records?

The Witness: There was no such thing as records in those days. That is the answer.

The Court: Well, the answer is it wasn't the practice to keep records?

The Witness: But not deliberately to destroy them.

By Mr. Williams:

Q. I am not implying destruction. A. No.

Q. You mean there were no records kept by the Bureau in your office? A. There were records kept by the Bureau, but to understand the situation—a man sits on a line and he could make some scribbled notes about it, but he had no tape, he had no wax, he had nothing to cut a record, no wire, nothing to cut a record of the thing.

Q. I am sorry. And nobody took it in shorthand.

Q. Maybe you misunderstood; I didn't mean by record a circular disk or a tape. I mean any kind of record, written memorandum—

The Court: Let me ask him a question.

[1108] *By the Court:*

Q. You just said the man might scribble down notes? A. Yes.

Q. Was it the practice for him to take those notes and make them a matter of record in the files of your office? A. No, sir. He would keep them himself.

Q. Did he take those notes and transcribe anything from them? A. He might transcribe confidential information which indicates that Joe Doakes is about to go to the bank and draw some money or something like that.

Q. Well, if he did that and he attributed it to a Costello telephone call, was it the practice to take that memorandum which he prepared and put it in the files and keep it in the files? A. Well, any report he wrote would be kept in the file, that is true, but there would be no separate report of telephones or anything like that. There would be no file of telephone calls. It would be in the general file.

Q. And if he made a memorandum of the hypothetical situation you just told us about, that Joe Doakes was

[1109] going to the bank to draw money, would he indicate on that memorandum that the source of his information was a telephone tap or would he indicate— A. No.

Q. Would he indicate any sort of— A. No. He would say information received and that would be it.

The Court: Very well.

By Mr. Williams:

Q. Do you know, Mr. Cheasty, what the source of the information was, and I have in mind specifically, was it a wiretap, that Costello, Seymour Weiss and Kastel were coming to New York?

Mr. Christy: I object to that.

The Court: I will allow him to answer if he knows.

A. I was told that we had information from New Orleans that the three men were coming to New York and that Weiss was coming to go to Europe.

By the Court:

Q. Do you mean by that that you don't know whether that information was received or acquired rather as a result of a wiretap or not? [1110] A. I don't know how it was acquired, sir.

Mr. Williams: That is all.

Mr. Christy: No further questions, your Honor.

Mr. Williams: Your Honor, at this time Defendant's Exhibit B was identified by the witness Shipsey on the

opening day of this particular hearing, October 7 and there has been much testimony concerning it. We have now broken down Defendant's Exhibit B, your Honor, by flagging each of the transcriptions about which Mr. Wadden testified on tying by annotation that transcription into an expenditure in the record, for the Court's accommodation if the Court desires time to look at it. So I believe your Honor, that this exhibit is now in posture to offer. Again I say to your Honor that we are really only offering such portions as are flagged, and they were flagged so that we would not have to disrupt the records of Mr. Hogan's office.

The Court: Very well. Let your adversary see it. I take it Exhibit B—I don't know whether it was marked as an exhibit or merely for identification.

Mr. Williams: It was marked B for identification.

[1111] The Court: You are now offering in evidence such parts of B for identification as you have flagged with little white pieces of paper.

Mr. Williams: Yes, sir.

The Court: Tying them in with certain expenditures concerning which testimony was received at the trial.

Mr. Williams: Yes, sir.

Mr. Christy: Now, your Honor, I would object,—

The Court: Well, the first thing I suppose you want to do is look at it.

Mr. Christy: Well, I can make an objection for the record without looking at them, your Honor.

The Court: Well, that is a good trick if you can do it.

Mr. Christy: I would object to the introduction on the ground that there is no evidence to connect these particular records with anybody in the Treasury Department or the United States Attorney's office, and even if they were unavailable under the Benanti decision it doesn't make any difference.

The Court: Well, in so far as your objection [1112] is based on that point it is overruled.

Mr. Christy: Unfortunately, your Honor, we didn't get a chance to look at all of these, through no fault of Mr. Williams, during the lunch hour. I would like to take a look at the specific ones which I did note at the time Mr. Wadden was on the stand. It would, naturally, take us about ten minutes to do it, if I might have that.

Mr. Williams: I have a suggestion, your Honor. I think we can move along and maybe Mr. Christy could do that overnight and have ample time to do it.

Mr. Christy: That is all right, with me, your Honor.

The Court: All right, now.

Mr. Williams, I am going to ask you to do something else, please. I wish you would make a schedule indicating the material there, what it is and what item it ties up to. In other words, it would be just a schedule of what is in there, so that I can look at the schedule instead of that formidable pile of papers.

Mr. Williams: We will have that for you tomorrow morning.

[1113] The Court: Well, not necessarily tomorrow morning but some time before you close so that I will have it available. I don't expect to be able to decide this case offhand.

Mr. Williams: Now, your Honor, with respect to Defendant's Exhibit C which are the plant cards which were brought here by the witness Shipsey and which were identified by him and which have been referred to many times, they, your Honor, are really an index of the transcriptions, and we found as we went through these that we really couldn't be of assistance to the Court by improving on the index because they are indexed alphabetically. It is easy to find any one of the plant cards.

Colloquy

The Court: Would you put a niece of paper in the file where they occur?

Mr. Williams: I think that would create a terrible mess, your Honor, because there are—I was going to suggest—

The Court: Well, let me ask you this: Do you really need the index cards?

Mr. Williams: Your Honor, only because I think it might become important to look at these plant cards, because there is some testimony that these other [1113-A] things that, for example, Mr. Christy read and Mr. Seymour read, and there is some testimony that the plant cards were made available to various agents who came over.

[1114] The Court: You have offered them in evidence but I must insist, Mr. Williams, if you want to draw the Court's attention to them you will have to indicate them in some way, and you will get adequate time to do that, by putting in slips of paper or a clip of some kind.

In other words, I am being quite frank with you. All the work that can be done by counsel I expect to be done.

Mr. Williams: Yes, sir.

Your Honor, Defendant's Exhibit D was identified as a telephone order which began on March 7, 1952—

The Court: Wait just a minute. Let me check it.

(Pause.)

The Court: Yes. All right.

Mr. Williams: D, your Honor, is a telephone order or it is an order of the court permitting the interception of telephone conversations over the Costello wire, dated March 7, 1952. I had a couple of witnesses identify this order. I think it is germane to the issue as to how long the tap was actually in on the defendant. I offer this at this time.

[1115] Mr. Christy: Your Honor, with regard to the order I don't have any objection. It indicates that the

order was obtained on March 7, 1952. I think the witness Fay testified that the tap went off on April 15, 1952, notwithstanding the order. But with regard to these pieces of paper which are on the other side of the envelope, I would object to the introduction of those. I don't know what they are and I don't think that they have been identified during the course of the hearing.

Mr. Williams: It is true they have not. I have no objection to their coming out.

The Court: Look at them. Is there anything there that might mislead the Court?

Mr. Christy: Yes, your Honor. You may recall that Mr. Williams tried to show through this paper that the tap did not go off until November 6, 1952.

The Court: Yes. But the witness testified to the contrary of that. He said it went off in April.

Mr. Christy: That is right, but I don't know what these papers are. As I said, there has been no identification. I object to their introduction.

[1116] The Court: Do you include them in the offer?

Mr. Williams: I withdraw them.

The Court: You withdraw that part of it and you offer only the balance?

Mr. Williams: I do not like to separate records.

The Court: I don't think it is necessary to do that. I think possibly you can depend on me not to consider the pages on the left side as part of the exhibit and consider only the orders themselves.

Mr. Christy: If the offer is restricted to that, I have no objection.

The Court: I understand Mr. Williams so restricts it.

Mr. Williams: Yes.

(Defendant's Exhibit D for Identification received in evidence.)

Colloquy

Mr. Williams: Your Honor, I would also like to offer Defendant's I, which has been identified as the mail watch orders which were produced here by the witness Karper out of the Ansonia Branch Station, and I took your copy, your Honor, of the breakdown of that exhibit yesterday.

[1117] The Court: Exhibits I-1 through 7?

Mr. Williams: Yes, sir.

The Court: I thought they had already been received.

Mr. Williams: They were identified but I don't think they were received.

The Court: This is a schedule, Exhibit I-1, covering a period December 26, 1951, to January 10, 1952. Do you have a list similar to that?

Mr. Christy: I do, your Honor. I inquired whether that is what was going in evidence or this exhibit I hold in my hand.

I have no objection to Defendant's Exhibit I, the mail watch information, other than the ones I have made before to that exhibit, your Honor.

The Court: I don't recall what they were. I overruled you before?

Mr. Christy: Yes, your Honor.

The Court: If you have any new arguments to offer, I will hear them.

Mr. Christy: I have no new arguments to offer.

The Court: I will assume the ruling will be the same and I adhere to it, so I shall receive them.

[1118] (Defendant's Exhibits I-1 to I-7, inclusive, for identification received in evidence.)

Mr. Williams: I offer at this time, your Honor, Defendant's J for identification, which is the mail watch order produced by the Port Washington postmaster. It is the same thing as we have just received except that this is Port Washington.

Mr. Christy: The same objection to that, your Honor.

The Court: What do you mean, the same objection? The same as what?

Mr. Christy: I objected to the mail watch information previously. This is the same thing as Defendant's I, except that it relates to the Port Washington post office.

The Court: Very well. Overruled and the exhibit will be received.

(Defendant's Exhibit J for identification received in evidence.)

Mr. Williams: Defendant's K, your Honor, has already been received. I think the clerk should have it. It is the custodial records of the Hogan office on the transcriptions.

Your Honor, I offer at this time Defendant's [1119] L for identification, which has not yet been received, which is a list of plant cards read by Mr. Christy and Mr. Seymour, produced by the witness Fay.

The Court: What is this? What is this exhibit? What is the designation of it? What is the letter?

Mr. Williams: It is L, your Honor.

The Court: I am confused. I have L consists of two sheets produced by Fay.

Mr. Williams: That's right.

The Court: I thought that had been received. It was originally marked for identification and now I have it was received.

Mr. Christy: I didn't think it had been received, your Honor.

The Court: I thought it had.

Do you object to it?

The Clerk: It is marked in evidence, your Honor. There is the sheet.

The Court: I thought so.

Mr. Williams: The last one, your Honor, is Defendant's O, which I believe has not yet been received in evidence, which is the so-called mail watch file produced here

yesterday by the Government. I [1120] have only a photostat of it because the original I understand is still in the Government's possession.

Mr. Christy: It is a Court exhibit—no, I am sorry.

Mr. Williams: I think, your Honor, that in this instance it is better for the original to go in because the photostat really is not truly representative of the original because the original consists of a lot of sheets tied together.

The Court: I recall it.

I take it Mr. Christy's objection is not so much to letting the Court have the original rather than a photostat as it is to receipt of the thing at all.

Mr. Christy: That is right, your Honor.

The Court: Do you have any objections other than those which were pressed at the time the matter first came up?

Mr. Christy: No, not to that last exhibit, I do not.

The Court: That is what I mean, Exhibit O.

Very well, that will be received.

Mr. Christy: Your Honor, with regard to L, I was under the impression that had only been marked for identification.

[1121] The Court: Apparently you stand alone in that, Mr. Christy. My notes indicate that it was marked for identification and later received, and the clerk's marking indicates the same thing and Mr. Williams apparently thought the same thing.

Mr. Williams: I have to say I do agree with Mr. Christy.

The Court: You are on his side?

Mr. Williams. Yes.

The Court: Maybe you can get together then.

Mr. Williams: I thought it had been identified only and not received.

The Court: So that there will be no difficulty about it we will consider it all over again.

What is it? It is the two papers Mr. Fay produced here and they purport to be some transcripts, don't they?

Mr. Christy: That is right, of the plant cards Mr. Fay produced.

The Court: Mr. Fay, as I recall it, said these were cards which were not actually turned over, isn't that it, but he read this information to you and the other assistants that were there? Am I mistaken about that?

[1122] Mr. Christy: I believe Mr. Fay testified that these six cards which are reflected on that exhibit you have were shown to us.

The Court: Were actually shown to you?

Mr. Christy: That is right.

My objection to it would be on the grounds that there is no testimony or evidence to indicate that that was a source of information of any of the testimony or evidence during the course of the trial.

The Court: Yes, that is the objection you made at the time it first came up. I asked you if you had any additional now.

At any rate, the objection is overruled and the exhibit is now received in evidence.

(Defendant's Exhibit L for identification received in evidence.)

Mr. Williams: These physically should be in possession of the clerk. They have been received already.

The Clerk: Oh, I didn't mark it yet.

Mr. Williams: Oh, Mr. Christy has the original. It is the mail watch statement.

Mr. Christy: However, your Honor, I would prefer not to have the original go in evidence. I [1123] would prefer to substitute a photostat for it.

The Court. Let me see a copy of the photostat. If the photostat is more difficult to read than the original, I don't know why you object to the original.

Mr. Williams: Your Honor, Mr.—

The Court: Pardon me just a moment. This photostat seems to be clear enough, Mr. Williams. I think I can read this without any difficulty. If I do have any difficulty reading it, why I can call for the original. It will be in your possession, won't it, Mr. Christy?

Mr. Christy: We would be glad to produce it any time your Honor requests it.

Mr. Williams: It turns out Defendant's L has been received in evidence, page 717, and both of us were in error.

The Clerk: Mark this in place of the original?

The Court: Yes, mark the photostat. I can get the original, I am told, if I need it.

(Defendant's Exhibit O for identification received in evidence.)

Mr. Williams: Your Honor, normally I would call Mr. Delaney at this point to prove the same [1124] things that I undertook to prove through the two witnesses this morning, Mr. Fennelly and Mr. Costello, but he is engaged in the Supreme Court today in Washington and he will not be here until tomorrow, so I must defer that. But I do have, your Honor, a breakdown on this jury question with which we were concerned this morning, and it occurred to me— I suggest this to the Court, that perhaps what needs to be done in the orderly procedure at this point is to get the information that your Honor was going to arrive at by inspection of the Court's Exhibit 2 and then I could make a determination as to whether there needs to be any further proof on that.

The Court: I am afraid I didn't quite get you. Let the reporter read to me what you just said, or maybe you can summarize it over again. I was quickly looking through that list and my attention was diverted.

Mr. Williams: I have given you a list, your Honor, of the actual jurors who sat, a list of the alternate jurors and

a list of the actual strikes that were made both by the defense and by the Government and those jurors who were excused by the Court, and there is also a legend there which indicates exactly [1125] who excused whom. The page number of the record is referred to so that your Honor can look at the record and see what colloquy actually took place at the time.

I think, your Honor, at this time we probably need the benefit of the information which you suggested this morning you would give us from your own study of Court's Exhibit 2 in relationship to the jurors on this list, and I would be disposed, your Honor, after that to rest with the exception of the testimony of Delaney, whom I have explained to your Honor this afternoon.

The Court: Just looking over this list I see that on the second page of this list it indicates that the juror who was then No. 1 in the box was excused by the Court, and you refer me to page 28, which does indeed indicate that the Court then excused him, but, if you go back to page 27, it appears he was excused because he said he couldn't afford the time to sit for a whole month, or page 26.

Doesn't that take that juror out of this?

Mr. Williams: I think so. We simply list--

The Court: I am not cirticizing you for putting it in. You had to do it this way. But where [1126] any juror was excused because his protestations to the Court indicated it would be inconvenient for him ,there is no need going into any question about that juror.

Mr. Williams: No.

The Court: My recollection is that all of those who were excused by the Court were excused because of the hardship which would be involved serving in a long case.

Now you come down to the next-to-the-last one there who was excused for cause. Let me look at that a minute.

(Pause.)

Colloquy

The Court: That was the case of a juror who said he had been summoned down to give some explanation of an expense acount. While he said he did not think it would predispose him one way or another, he said he couldn't say. The United States Attorney challenged him for cause and the cause was allowed.

Do you think that necessarily means that he ought to be included in this review, or would he not fall into the same category as the others?

Mr. Williams: I think basically, your Honor, we are concerned with the peremptory challenges, although I wouldn't want to—

[1127] The Court: Here is a matter that was fully discussed. It appears in the record. The man raised the question himself.

Mr. Williams: We just had to give you all—

The Court: We didn't have television at that time and I can't tell now, but, from the way this witness answered and reading this record, it would appear to me that the witness seemed to me to be unsure, that he was trying to be a perfectly frank person in saying, "Well, I don't think it would bother me one way or another but I can't be sure," and in view of that I allowed the chailenge for cause and excused him.

Mr Williams: There are only very few excused by the Court, your Honor, but we had to list them because they came in sequence.

The Court: Sure you did, but do we not agree that where they were excused because of claims of hardship that would take them out, we don't need to concern ourselves with them any more and there can't be any doubt about that because the record will indicate it?

Mr. Williams: Yes.

The Court: All right.

[1128] The clerk is concerned here.

What is this A for identification, Mr. Williams?

Colloquy

Mr. Williams: Your Honor, that is the statement about which there was a line of inquiry on June 13. It is the so-called Ronayne net worth statement, and on June 13, when this matter came up, the question was raised by Mr. Christy that certain portions of that statement had been blacked out, I think, as it went into the actual trial record, and your Honor said then that anything that is in the record is something I must take notice of.

I don't know whether your Honor is going to use the record itself as a basis for looking at that particular statement, or whether you wanted it in that form.

The Court: Was it read into the record or was it merely offered as an exhibit?

Mr. Williams: It was offered—

The Court: Was it offered as an exhibit in the trial?

Mr. Williams: Yes.

Mr. Christy: Yes, it was. Mr. Williams offered the whole thing and I—

[1129] The Court: As I understand it, this statement, or parts of this statement, were offered in evidence at the tax trial.

Mr. Christy: That is correct, your Honor.

The Court: Were they received in evidence?

Mr. Christy: Yes, your Honor.

The Court: Were they read into the record or was a set of papers just merely received as an exhibit?

Mr. Christy: Just a set of papers was received, as I recall.

The Court: All right. What does A purport to be here, this A that I have here?

Mr. Williams: Here is a copy of it, your Honor.

The Court: Is that a copy of the whole statement or only so much of the statement as was received at the trial?

Mr. Williams: It is a copy of the whole statement, your Honor.

The Court: Mr. Christy's objection is that all that should be now received is whatever was received at the trial.

Mr. Christy: That is correct, your Honor.

[1130] The Court: Why is that not so?

Mr. Williams: I think that is so, your Honor. I agree to that. Government's Exhibit 23 at the trial was that portion of the statement that was received. It is blacked out in the record on appeal. I can arrange to have that transcribed omitting the portions that are blacked out here and offer it tomorrow morning.

The Court: Very well.

Mr. Williams: Your Honor, my suggestion was I think we probably can't go forward until we have the information that we do need on this jury question. I don't know what your Honor's disposition is with respect to that.

The Court: I am not prepared to rule on it now. I would like to give it some thought.

Now I have this list that you have given me of the names of the jurors and those that were excused.

May I have Court's Exhibit 2 or do I already have it?

Mr. Christy: I have it, your Honor.

The Court: May I have Court's Exhibit 2?

(Mr. Christy hands to Court.)

[1131] The Court: I don't think I need anything else to work this out. I think we had better adjourn, then, this afternoon if you think you have nothing else to go forward with at this time.

I have some other questions that I was going to ask but I think I will withhold those until we conclude with this point here and then any other witnesses you have.

Is there anything else you want to bring to my attention now?

Mr. Christy: I have nothing, your Honor, at this time.

Mr. Williams: I have nothing.

Colloquy

The Court: We will adjourn until 10:30 tomorrow morning.

The clerk, of course, is not going to hold on to the exhibits. You can each take your exhibits and when the case is finally submitted to me then each of you will turn in your exhibits, but until that is done you may take care of your own exhibits. So the clerk will give back to you whatever exhibits of yours are on his table.

10:30 tomorrow morning.

(Adjourned to October 16, 1957, at 10:30 A. M.)

[1132] New York, October 16, 1957,
10:30 o'clock A. M.

(Hearing resumed.)

The Court: Does counsel have anything they desire to say this morning? When we recessed yesterday afternoon it was on the note that you had stated, Mr. Williams, you had now reached the point where in order to continue your cross-examination you ought to have access to Court's Exhibit No. 2, and that was reserved.

Since we recessed yesterday afternoon have you thought of anything else that you want to bring to my attention?

Mr. Williams: No, I think I have pretty much stated our position, your Honor. I understood that your Honor was considering giving us certain parts of the information which we had requested.

The Court: Yes.

Mr. Williams: Of course, I said to your Honor yesterday that I still respectfully requested of your [1133] Honor that we be given—

The Court: You think nothing less than the full exposure of the list to you for purposes of cross-examination would be adequate for your purposes?

Mr. Williams: Yes.

The Court: And you certainly protected that position on this record.

Do you have anything further to say, Mr. Christy?

Mr. Christy: No. I have noted my objection to the production to Mr. Williams of Court's Exhibit 2.

The Court: You have maintained your position on the record with respect to that, too.

I have gone through the data that you handed me yesterday, namely, the list of the jurors, and I have available the part of the record where the voir dire is recorded and I have decided to do this:

I have decided to give the information which I am now going to state for the record. Beyond that at the present time I see no reason to grant any further information.

The jury that was empaneled in the case of United States v. Costello, Indictment C. 141-9, consisted of twelve jurors and there were drawn [1134] also three alternates. The twelve jurors consisted of seven men and five women. The alternates consisted of one man and two women. Of the members who sat on the jury that returned the verdict, eight were employed and four were housewives. Of the eight employed, all were employed in private industry. Of the alternates, two were employed and one was a housewife. Of the twelve persons who sat on the jury that returned the verdict, eight, according to the list of the panel of jurors which is now marked Court's Exhibit 2 for identification, were marked in category No. 1; two of the jurors were marked in category No. 2, and two of the jurors were marked in category No. 3. Of the alternates, two were marked in category No. 1 and one was marked in category No. 2.

[1135] Now with respect to the challenges, the Government is allowed—was at that trial—six peremptory challenges, of which it used but five. Of those challenged by the Government, two were marked category No. 2 in

Court's Exhibit 2 for identification, and three were marked in category No. 3.

The defendant was allowed ten challenges and used that number. Of these, four were in category No. 1, five were in category No. 2, and one in category No. 3.

Of course, wherever I refer to categories, I mean the categories as they appear on Court's Exhibit 2 for identification, concerning which there was testimony.

It appears also in the record that the Court excused six jurors who were called in the panel and, as the record indicates, in each case the excuse was granted on the ground of a hardship claimed by the particular juror. Of these six people, two were in category No. 1, two were in category No. 2, and one was in category No. 3.

The record also discloses that one juror was excused for cause on the voir dire; the circumstances which laid the basis for the cause which the Court [1136] allowed appear in the transcript of the trial record. That juror was marked in category No. 2.

That concludes the statement that I have to make with respect to that.

Mr. Christy: Your Honor, do I understand that the figures that you have just read are based on the list which was submitted to your Honor by Mr. Williams?

The Court: Yes.

Mr. Christy: Your Honor, I feel I must call to the Court's attention that an examination by the Government of Mr. Williams' list with the voir dire examination indicates that Mr. Williams' list is not complete.

The Court: Very well. What other names do you desire to call to my attention?

Mr. Christy: With regard—I don't wish to mention any names, your Honor—

The Court: If you will take a copy of the transcript which I have here and indicate by putting slips of paper in the pages where you—do you claim that there were

other names called? I am not quite sure what the basis of the alleged inaccuracy is or of what does the inaccuracy of Mr. Williams' list consist.

[1137] Mr. Christy: The fact that on page 2 of his list, where, as I understand it, two persons who were called and excused—

The Court: Which do not appear there?

Mr. Christy: Which do not appear there.

The Court: Will you indicate in the record where they occur?

Mr. Christy: Yes, sir.

The Court: I suppose the record will indicate whether they were excused by the Court or by reason of challenge.

Mr. Christy: They were both excused by the Court.

The Court: I thought it must be something like that, because the challenges, the allowed challenges are all accounted for, except one, which apparently the Government did not exercise. In doing so, the transcript was clear at one time where the Government might have excused two jurors, only one was excused and the other waived.

If you are referring to some which which appears in the transcript, Mr. Christy, I see no reason for withholding any names, because that's a matter of public record now. Indeed, all of these names [1138] that appear on Mr. Williams' list that he gave me last night—

Mr. Christy: The names are B. Gray, who was seated in the 10 spot, and F. Wallace.

The Court: Let me see the record on that. On what page does that appear?

Mr. Christy: Give me a moment, your Honor. I don't have the page. With regard to Wallace and Gray, page 75 they were called; on page 78 Mrs. Wallace was excused; on page 75 Gray was excused.

The Court: It appears on page 78 that one of the jurors was excused because at the time she was called as a

juror her husband had his income tax returns under investigation by the department and the difference between him and the department, if there was a difference, had not yet been reconciled, and the record shows that the Court excused that juror on his own motion; and with respect to the other one it appears on page 75 that that juror was excused because of claim of hardship; that it would be difficult for him to give up the time necessary for the trial.

I don't see any reason to add anything more to what I have said.

Mr. Christy: All right.

[1139] The Court: Undoubtedly that was only an oversight on Mr. Williams' part in failing to include those people.

Mr. Williams: Your Honor, I believe we suspended when Mr. Leath was on examination and I had completed my direct examination of him.

The Court: Very well.

Mr. Christy: May he be called for cross examination, your Honor?

The Court: Yes.

WILFRED T. LEATH, resumed.

Cross examination by Mr. Christy:

Q. Mr. Leath, you never saw prior to the trial or during the trial any of the tax returns of any of the members of the panel that were inspected, did you? A. No, sir.

Q. And, Mr. Leath, you never talked to any person on the panel whose return was inspected prior to or during the trial? A. No, sir.

[1140] Q. Or never talked to any member of the panel prior to or during the trial? A. No, sir.

Q. And, as far as you know, Mr. Leath, no member of the panel was aware that his return was being inspected? A. Not to my knowledge.

Q. And as far as you know, Mr. Leath, no Treasury agent talked to any member of the panel prior to or during the trial? A. Not to my knowledge, no, sir.

Q. From your experience, Mr. Leath, the fact that only 150 returns of the 360 persons on the panel were inspected does not necessarily mean that the others did not file, does it? A. No, sir.

Q. From your experience, one of the reasons that no more than 150 returns may have been inspected was that the person on the panel may have filed in a different district; is that correct? A. They could have, yes, sir.

Q. It is not unusual for a person to file in a district other than his residence, is it? A. Well, generally they file in their resident [1141] district. However, there are occasions—it probably happens quite often—where people file where their business place is.

Q. And from your experience another reason why no more than 150 returns may have been located is that it would be difficult, if not impossible, to find the return of a woman juror on the panel whose name was listed as Mrs. Sarah Doe or Mrs. Jane Roe, something like that? A. Yes, sir.

Q. That would be because you don't have the husband's name? A. Generally, yes, sir.

Q. Mr. Leath, at the time that the income tax case on Costello was referred over to the United States Attorney's office, you were generally familiar with it, were you not? A. Generally, yes, sir.

Q. And do you know, Mr. Leath, if at the time the case was referred to the United States Attorney's office the Treasury Department had already conducted interviews and determined the expenditures of Frank Costello at the Roosevelt Hotel?

William T. Leath—for Defendant—Redirect

Mr. Williams: Your Honor, I think this is [1142] going beyond the scope of the direct examination and I object to it for that reason. I interrogated this witness concerning the jury list. I object to that line of questions.

The Court. Overruled.

A. Yes, sir. We had been in contact with him prior to the time the case was referred here.

Q. That would have been before 1953? A. Yes, sir.

Mr. Christy. Thank you.

Redirect examination by Mr. Williams:

Q. Did I understand you, Mr. Leath, to say that if you had the name Sarah Doe, 251 Broadway, New York City, New York, that you could not find her income tax return if she was married and her husband filed? A. Well, it would depend. It is very difficult for me to answer that, Mr. Williams, because I am not too familiar with the filing system in the Collector's office. I know from experience that we have had difficulty where we had just had the wife's name without the corresponding husband's name. Some of that difficulty arises because you would have persons with similar names and—

[1143] Q. Same addresses? A. Well, not necessarily the same address. The address, of course, generally would be the determining factor.

Q. Mr. Christy touched on your experience to ask you about the filing place of returns. Isn't it your experience that in virtually all cases people file their returns in the district wherein there reside, at that Collector's office? A. Generally, but there are instances where people file where they have their place of business for their own personal convenience.

Q. That would be unusual, would it not? A. Well, it is difficult to answer that it is unusual, Mr. Williams, because I don't know exact figures on that.

Mr. Williams: That is all.
Mr. Christy: No further questions.
The Court: All right.
(Witness excused.)
Mr. Williams: Mr. Delaney please.

[1144] JOSEPH LEARY DELANEY, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live, Mr. Delaney? A. 420 Clinton Avenue, Brooklyn.

Q. How long have you lived there, sir? A. About twenty years.

Q. What is your occupation? A. I am a lawyer.

Q. How long have you been engaged as a lawyer? A. About 22 years.

Q. And you a membe- of the Bar of this Court, are you, sir? A. I am.

Q. Mr. Delaney, was there a time when you were engaged as an Assistant United States Atorney? A. There was.

Q. How long ago was that? A. From 1935 until 1940.

Was that in the Southern District of New York? A. In this district, that's right.

Q. Mr. Delaney,, directing your attention to the yea- 1954, were you of counsel in the case captioned [1145]

United States v. Costello which was numbered C. 141-9 and tried in this court? A. I was, sir.

Q. With whom were you associated in that case? A. Mr. Leo Fennelly.

Q. And Mr. Fennelly is a member of the New York Bar? A. That is right.

Q. Mr. Delaney, did you know at that time that the Bureau of Internal Revenue through its agents, had access to intercepted telephone conversations of Frank Costello which were transcribed in Mr. Frank Hogan's office? A. I did not.

Q. Did you know in 1954 that there was a mail watch on Mr. Costello? A. I did not.

Q. Do you know what a mail watch is now, sir? A. I do now.

Q. Did you have any knowledge that the income tax returns of the jury panel for April, 1954, had been inspected— A. No, sir.

Q. —prior to the trial? [1146] A. No, sir, I did not.

Q. When did you learn about the jury panel inspection? A. I think last week when I read it in the newspapers.

Q. When did you learn of the mail cover? A. A few weeks ago or I guess a few months ago when this hearing first went on someone mentioned it.

Q. When was the first time that you learned that agents of the Bureau of Internal Revenue had access to Mr. Hogan's office, if you did learn that? A. Within the last six months or so I have been told.

Mr. Williams: You may examine.

Cross examination by Mr. Christy:

Q. Mr. Delaney, you were familiar with the Kefauver hearings, were you not? A. To a certain extent, yes.

Joseph Leary Delaney—for Defendant—Cross

Q. You read about them in the newspapers? A. Yes, and I read some of the reports, transcripts.

Q. And you were aware, were you not, at that time that Frank Costello's telephone had been tapped in earlier years? [1147] A. I understood from some of those reports that Mr. Hogan had tapped or he authorized taps of Mr. Costello's wire, that is right.

Q. And you knew that in 1951? A. Yes, I did.

Q. And do you recall the Aurellio hearings in 1943? A. I don't recall them, but I do remember reading about them.

Q. In the newspapers? A. That's right.

Q. And you recall also, do you not; reports in the newspapers about wiretaps that had been installed by the New York County District Attorney's office on Frank Costello? A. That is right.

Mr. Christy: No further questions.

Mr. Williams: Thank you, Mr. Delaney.

The Court : I would like to ask some question.

By the Court:

Q. Mr. Delaney, in your experience as an Assistant United States Attorney, did it not come to your attention that there was a general practice of cooperation among law enforcement agents regardless [1147-A] of whether they came from the State, the City or the Federal Government? A. Not in my day, your Honor.

The Court: Very well.

Witness excused.)

[1148] Mr. Williams: Your Honor, I have a couple of formal questions to ask Mr. Christy and I would like to call him to the stand.

Th. Court: You wish Mr. Christy to take the stand?

Mr. Williams: Yes.

Mr. Christy: Your Honor, I have no objection to being called. May I confer with my associate, though, for just a moment?

The Court: Of course.

(Pause.)

ARTHUR H. CHRISTY, called as a witness by defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Williams:

Q. Where do you live? A. 8 Peter Cooper Road, New York City.

Q. You are presently serving as the Chief Assistant United States Attorney for the Southern District of New York? A. That's correct, Mr. Williams.

Q. Mr. Christy, have you seen in your examination of your files in this case any letter over the signature of the United States Attorney to the Commissioner [1149] of Internal Revenue requesting information from the jury returns of the persons who were on the panel in April of 1954?

The Court: Read the question, please.

(Question read.)

Mr. Williams: I misspoke myself. I meant tax returns.

A. Mr. Williams, I do not recall ever seeing such a letter.

Q. Have you ever seen such a letter over the signature of the Attorney General of the United States on this subject in this case? A. I don't recall ever seeing such a letter.

Arthur H. Christy—for Defendant—Direct

Q. Have you ever seen such a letter over the signature of an Assistant Attorney General of the United States on this subject matter in this case? A. I don't recall ever seeing such a letter.

Q. Do you know, Mr. Christy, whether a letter was ever sent by anyone from the Department of Justice to the Commissioner of Internal Revenue seeking information from the tax returns of the April, 1954, jury panel of this court? A. I do not.

Q. Would you search your files, sir, and produce [1150] such a letter if it is in existence? A. I will be glad to search the files.

Q. Would such a letter normally be in the files of this case, if it were in existence?

Mr. Londin: Objection. The question is hypothetical. The witness has denied ever seeing such a letter.

By the Court:

Q. If such a letter had been written, for instance, by the Attorney General, would a copy of that letter be likely to be in the United States Attorney's files, as far as you know? A. Your Honor, I am unable to answer that question.

Q. That's the answer to that.

Have you ever at any time in your experience as an Assistant United States Attorney known of any such letter in this or any other case? A. I have never seen one.

Q. So the fact is you can't tell what the practice would be because you don't know of the existence of the practice; is that what you mean? A. That's correct, your Honor.

The Court: All right.

Arthur H. Christy—for Defendant—Cross

[1151] *By Mr. Williams:*

Q. Do you know, Mr. Christy, whether such a letter was written? A. I believe I answered that question.

The Court: I thought he said that. However, you may press it again, if you wish.

Mr. Williams: No, that is all.

Cross examination by Mr. Londin:

Q. Addressing yourself to the letters referred to by Mr. Williams, can you state categorically whether you know of the existence or non-existence of these letters? A. I am unable to so state.

Q. Can you state categorically that you have never seen such letters? A. No.

Q. Mr. Christy—

Mr. Williams: I didn't hear that answer.

The Court: He said "no."

Q. Mr. Christy, have you ever seen the tax returns of any members of the panel prior to trial, prior to the Costello trial in 1954? A. No, I never saw any of the tax returns.

Q. Do you know of anyone who did see them? [1152] A. I do not know of anyone who saw them.

Q. Except for the agent who may have pulled them? A. Except for Mr. Geissler, who testified that he did.

Q. Did you ever talk to any member of the jury or anyone on that panel fom which the jury was drawn?

The Court: Prior to the trial.

Q. Prior to the trial. A. I did not.

Q. Do you know if any member of the United States Attorney's staff did? A. I do not. I am quite certain that none did.

Q. To your knowledge, did any member of the Treasury Department speak to any member on this panel prior to the trial or during the trial? A. To my knowledge, no member of the Treasury Department did.

Q. Addressing yourself to the classification of the jury, were you present when that was done? A. I recall being present during part of the classification.

Q. Would you please tell the Court how this classification was arrived at? A. As I recall, Mr. McMahon and I and Agent Murphy [1153] and perhaps one of the other assistants, but I am not certain, sat down some time prior to the trial. At that time Mr. Murphy had some information which he gave orally. I do not recall ever seeing anything written that Mr. Murphy had. We also had other information and we sat down and, on the basis of the information available, a classification was made and we discussed it, as I recall, as a basis for exercising our peremptory challenges during the voir dire examination. I am not aware of which person wrote down the classification. I did not. Whoever wrote it down used his own judgment plus the information that was given to him orally at the time we did it.

Q. Mr. Christy, you recalled some testimony by Mr. Fay about plant cards shown to you and Mr. Seymour, perhaps. A. Yes, I recall that information.

Mr. Williams: This is clearly outside the scope of the examination. Perhaps, I think, some of this that has gone on is outside the scope of the direct. I object to it. I don't think it is appropriate for cross examination to go into another facet of the motion on which I did not interrogate.

[1154] The Court: That is pretty much a matter of judgment. I take it your point would be that this represents defense that ought to go in on the Government's case, if it elects to put in a case.

Mr. Williams: Inasmuch as Mr. Christy has announced that he proposes to make a motion at the conclusion of our evidence, I don't think—

The Court: I think there is something to that, yes. I will sustain the objection.

Mr. Londin: I won't press the point.

By Mr. Londin:

Q. Mr. Christy, addressing yourself to the classification again about which you have just spoken, do you know whether this classification was made exclusively on the basis of information drawn from the income tax returns? A. I know it was not.

Mr. Londin: No further questions.

Redirect examination by Mr. Williams:

Q. At the time the classification was made there was information from the income tax returns available to Mr. McMahon and yourself, was there not? A. I cannot state that there was, Mr. Williams, because I do not know. I know that Mr. Murphy joined [1155] in this discussion. That is my recollection. What information he had I don't recall, nor do I know where he got the information.

Q. Did you know at the time, Mr. Christy, that the income tax returns of the prospective jurors had been examined? A. I did not know that, Mr Williams.

Q. You did not know that? A. No.

Q. Was there any discussion about the examination of returns later? A. I don't recall any such discussion.

Arthur H. Christy—for Defendant—Redirect

Q. Did Mr. Murphy provide information to Mr. McMahon during the classification of the jurors? A. He participated in the discussion, yes.

Q. Did he have a contribution in the way of information on the prospective jurors as the classification was made? A. I am unable to recall at this time, Mr. Williams, what Mr. Murphy said. My only recollection is that he participated in the discussion.

Q. You and Mr. McMahon and Mr. Murphy were present at this time? A. And another assistant, but I am not sure which [1156] one it was. That is my best recollection.

Q. But you have no recollection at all, as I understand it, of any income tax return information being furnished at that conference? A. I can't say that it wasn't. All I can say, Mr. Williams, I don't recall any such information, or it was so designated.

Q. Do you have a recollection of any other type of information that was furnished? A. Yes.

Q. What other information was furnished, typewise?

Mr. Londin: Objected to.
The Court: Sustained.

By Mr. Williams:

Q. Do you recall, Mr. Christy, that there were written reports in the possession of Mr. Murphy at the time of the classification of jurors?

Mr. Londin: Objected to. It is now exceeding the scope of redirect examination.
The Court: Overruled.
(Question read.)

A. Mr. Williams, I recall—

The Court: I suppose anything that Mr. Murphy [1157] had in his possession would be in his possession whether it was in a file, in his own office or in his home or any place else. What you are coming to, I think, is whether or not this man knew that there were any reports present with Mr. Murphy as Mr. Murphy participated in this discussion.

Mr. Williams: That was the intent of my question, your Honor. I mean physically in the question.

The Court: I thought that was what you were looking for, but the question was broad enough to leave it very much at large.

Q. Do you recall, Mr. Christy, whether Mr. Murphy physically had any materials, written memoranda, reports, in his possession at the time that the classification was made? A. My recollection, Mr. Williams, is that Mr. Murphy had some papers. What they were I have no way of knowing. I did not see them.

Q. As he made his contributions information-wise during the classification, did he refer to these papers?

Mr. Londin: Objection, your Honor.

The Court: Overruled.

[1158] A. I can't recall that he did, nor can I recall that he did not.

Q. Mr. Christy, did he have information on those papers to your recollection, if you recall, concerning individual members of the panel? A. Mr. Williams, I did not see the papers, as I have explained to you. I am unable to state what was in the papers.

Q. Did you participate only in a small portion of this conference on the classification? A. My best recollection is that I was there during at least half of it.

Q. How long did it last?

The Court: Sustained.

Mr. Williams: That is all I have, your Honor.

The Court: Do you have any recross.

Mr. Londin: No, sir.

The Court: Mr. Christy, as I recall Mr. Murphy's testimony, he said the purpose of the classification was to set up categories by numbers: 1, 2, 3 and 4. When asked about category No. 1, he said, as far he knew, that represented a class that it was thought would be more favorable to the Government. When Mr. [1159] Pierpoint was on the stand, he said it was his understanding that the purpose of the classification was to ascertain as much as could be, to study as much as was known about anybody, in order to exercise challenges in a way that would prevent people who would be biased against the Government going on the jury and enable the Government to exercise its challenges with that in view. Can you throw any enlightenment on that?

The Witness: Your Honor, I don't recall any discussion about whether jurors would be favorable or unfavorable to the Government during the time of classification. It is my recollection that we sat down and went over whatever information was available to the Government at that time in an effort to determine how best to exercise the peremptory challenges which we were to be given.

The Court: Very well. Any further questions?

Mr. Londin: No.

The Court: Very well.

(Witness excused.)

[1160] Mr. Williams: Your Honor, I think that the record is in a state of suspension with respect to Defendant's Exhibit B, which Mr. Christy was going to review. I had formerly offered it. I don't believe it had been received, your Honor.

The Court: What is it?

Colloquy

Mr. Williams: That is the transcriptions from the Hogan office, your Honor.

The Court: Are those some of the cards that were produced by Mr. Fay?

Mr. Williams: They were the actual transcriptions, as I recall, your Honor.

The Court: Where are they? Let me see them. What are we going to do about them?

Mr. Williams: Mr. Christy was going to look them over.

The Court: First of all, have you looked them over?

Mr. Christy: I have looked them over.

The Court: Are you ready now to take your position and state your views?

Mr. Christy: Yes, your Honor.

The Court: Before we go further, may I see them?

[1161] Mr. Williams: Mr. Wadden just went out to get them, your Honor.

The Court: Suppose we withhold your statement for a minute until they come back.

Mr. Williams: While we are waiting for him, your Honor, I can report to you that Defendant's Exhibit A, which is the Ronayne statement, has been typed up excluding those portions which did not go into evidence at the actual trial.

You will recall there was an objection made by Mr. Christy because the exhibit which I offered yesterday contained matters which did not go into the record at the trial. I have had that retyped excluding the blocked portions. That is Defendant's Exhibit A for identification, which I am now offering in evidence.

Mr. Christy: Your Honor, with Mr. Williams' representation that this is a reflection of what is actually in the record, I would have no objection.

The Court: Very well. It will be received now.

(Defendant's Exhibit A received in evidence.)

The Court: Now I remember those. That is the formidable bundle of papers which you have flagged?

[1162] Mr. Wadden: Yes, sir.

Mr. Christy: Your Honor, I would renew my objection to the introduction of any of these papers on the grounds that there has been no connection shown between these taps and use by the Government of any of the witnesses referred to in any of the taps.

The Court: I take it that it is Mr. Williams' position that these taps relate to matters concerning which testimony came in at the trial from other witnesses, and I anticipate that he is going to argue that the existence of the taps plus the testimony concerning those matters at least supports an inference that the source of the information by which the Government was able to secure the evidence actually received at the trial were these taps.

Am I wrong about that, Mr. Williams?

Mr. Williams: That is substantially the position we are taking, your Honor.

The Court: All right. You still say that is not sufficient?

Mr. Christy: Your Honor, I think he must go further. It may be mere coincidence that these taps reflect names of the persons who appeared as witnesses [1163] at the trial. He must bridge the gap, it seems to me, between these taps and use by the Government of these taps in securing the witnesses, and this he has not done.

The most the record shows, as I recall it, is that certain wiretap information may have been made available to agents of the Government during the 1940s.

The Court: I am not so sure of that position. After all, it may be—I do not know whether it is, but it may be that that is as far as any defendant could possibly go, and the question then is whether, having gone that far, that does not shift the burden of going forward to you to show that these were not the sources of your infor-

mation. I do not know. I am not ruling on that now, but I think there is sufficient here to support the receipt of these transcriptions unless you have some other arguments to offer. In so far as that point you just made goes, I would overrule your objection. If you have other points, I will consider those.

Mr. Christy: Your Honor, as I understand the Nardone case, the defendant must show some use by the Government of the wiretapped information, and [1164] I do not understand the record to show any use by the Government of any of this wiretapped information.

The Court: I think you are right on that. However, I am going to receive them.

Mr. Christy: I have a further objection to—

The Court: When I say I am going to receive them, I do not mean I am going to preclude you from offering any other ground, but on the first ground I overrule the objection to that.

Mr. Christy: And you overrule me on the ground that the defendant has not shown any use by the Government of these wire—

The Court: So that there well be no question about it, I am now not making any finding with respect to what the Government used of whether it used any part of it at all. All I am saying now is that on the basis of the argument which you have just made, if that is all you were to offer I would overrule the objection. I understand you have other grounds you wish to urge, and I shall hear those.

Mr. Christy: Then, your Honor, I would object to the receipt in evidence of any of the wiretapped transcripts that relate to Wilma Gowns. Your [1165] Honor may recall that when Mr. Wadden was on the stand he had a schedule in which he referred to expenditures by some of these witnesses and related to the wiretaps, and among them was Wilma Gowns.

I have, together with the agents, examined all of the transcripts in Defendant's Exhibit B which are flagged as Wilma Gowns, and there is no indication in any of these transcripts that Wilma Gowns was either calling Mrs. Costello or that Mrs. Costello called Wilma Gowns. In other words, neither the name of Wilma Gowns nor the number of Wilma Gowns, as far as I can see, appears anywhere in the transcripts.

Therefore, I would argue that they should be excluded since there is no connection shown between the transcripts Mr. Wadden has identified and Wilma Gowns.

The Court: Do you care to be heard on that, Mr. Williams?

Mr. Williams: Yes, your Honor. There are 19 calls to which Mr. Wadden testified between Mrs. Costello and her saleslady at Wilma Gowns whose name was Gloria. Gloria, as shown from these transcripts, was an employee of Wilma Gowns. Mrs. Costello called [1166] her at her home concerning alterations of her clothing, clothes that she was buying, and Gloria was at that time on the payroll of Wilma Gowns and they discussed throughout the transcriptions, as I understand it, the fact that certain purchases she made—

The Court: Is there any question about that?

Mr. Christy: Yes, I have a very grave question about it. If Mr. Williams believes that is so, I would like to have it shown to me in the transcripts.

The Court: First of all, do you question that this lady who Mr. Williams calls a sales person was an employee of Wilma Gowns?

Mr. Christy: Yes, I do, sir.

The Court: Very well. What do you say as to that, Mr. Williams?

Mr. Williams: I suppose what I will have to do now is go through these transcriptions. We made contemporaneous notes showing this at the time, your Honor. None

of us remembers precisely what was said in each conversation, but we will now have to go through each of the calls and establish this.

The Court: I take it the first point is to establish that this lady is or was, rather, at that [1167] time employed at Wilma Gowns.

Is there anything else to indicate that these conversations actually occurred between somebody talking on the telephone in the Costello home and somebody actually present at the Wilma Gowns shop?

Mr. Williams: No.

Mr. Christy: No, sir.

The Court: Is there any evidence what telephone was called?

Mr. Williams: I would be glad, your Honor, to reserve that until we can enlighten your Honor on the facts, and I cannot at the moment.

The Court: Of course you cannot. I understand that.

Mr. Williams: I mean reserve that portion of the exhibit on Wilma Gowns.

The Court: So many of the transcriptions as relate to Wilma Gowns. All right.

Mr. Christy: I would have a further objection, your Honor, to the introduction of any evidence or testimony relating to the maids, Mary Branch and Estelle Brown.

The Court: You mean any transcriptions?

[1168] Mr. Christy: I do not see any transcriptions in there flagged as Mary Branch or Estelle Brown. Mr. Wadden testified, as I recall it, to expenditures proved by the Government made by Costello to these two persons, but I don't see any transcript in there which reveals the names of the maids. There is no question but that the transcripts do say on occasion "Estelle answered" or "A maid answered," something like that, but there is no actual designation by name, Estelle Brown or Mary Branch.

Colloquy

Mr. Williams: I think maybe Mr. Wadden could best enlighten your Honor on that because he actually has read these transcriptions.

Mr. Wadden: Your Honor, throughout these transcripts there appears from time to time the names of those various maids. At times they are identified by the police officers as the maids; at other times they are identified by their names.

To go through and flag all the times Estelle is identified as Estelle, the maid, or Mary as Mary, the maid, we would have that many more slips, I think. So, as I told your Honor in testifying, I included them as part of our position on the wiretaps because they appear throughout the wiretapped transcriptions. [1169] There is no specific call they made or expenditure they made over the taps.

The Court: Is there any transcription there flagged that describes them as the maids?

Mr. Wadden: No, I didn't do that, your Honor. I can do it.

The Court: The reason I ask is you say they were referred to from time to time by the officers who were working on the interception as maids.

Mr. Wadden: That is correct, your Honor. I will go through and flag enough for identification.

The Court: I think that would be sufficient.

Mr. Wadden: Thank you.

The Court: Anything else?

Mr. Christy: Yes, there is one more. I would object to any transcriptions relating to the Strand Garage.

Your Honor may recall that at the time Mr. Wadden was on the stand we had some discussion about the Strand Garage, and I do not think your Honor actually made a ruling on it. It was the Government's position that the Strand Garage was not a witness or nobody from the Strand Garage was a witness during the course of the trial. There were two witnesses who [1170] testified about

expenditures made by the Costellos at what was the same garage but two different owners, and no testimony about the Strand Garage which is reflected in the wiretapped conversations.

The Court: Mr. Wadden can take this over. He is the expert on this.

Mr. Wadden: Your Honor, there was some confusion at the time we went through these transcripts as to the West 68th Street garage and the West 69th Street garage.

I testified to the West 68th Street garage at 308 West 68th Street, an expenditure of $342.52. Maybe Mr. Christy can enlighten me as to whether that is the Strand Garage or the other garage.

Which is it, Mr. Christy?

Mr. Christy. We did not use the Strand Garage as a witness, your Honor.

Mr. Wadden: Mr. Christy, what I am trying to ascertain is which one of these garages, the one at 308 West 68th Street or the one at 246 West 69th Street, is the Strand Garage.

Mr. Christy: I don't know the answer to that. That is Mr. Wadden's problem, it seems to me.

[1171] The Court: Would it be a good idea to start with whatever the trial transcript shows and see which garage that is and then check whether any of these calls related to that garage regardless of what it was called?

Mr. Wadden: Your Honor, my point was that we only put in one expenditure for both garages. We have taps on both garages. So I did not testify to any expenditure that was not actually placed in evidence by the Government.

Mr. Christy: The only testimony about a garage was from two witnesses who testified about expenditures by the Costelles at a garage at 230 West 68th Street. At one time it was known as the West 68th Street garage and subsequently it became known as the G & K garage, or

vice versa, I am not sure which. It was the garage located at one place under two different owners.

The Court: Very well. I will not receive anything with respect to the Strand Garage until some time—and I will give you the opportunity to do it—as you show that those calls related to the garage concerning which testimony was received at the trial.

Mr. Wadden: Thank you.

[1172] The Court: Anything else?

Mr. Christy: No, your Honor. Those are all my individual objections.

The Court: With respect to the first ground of your objection, that is overruled.

With respect to the Wilma Gowns, I will hold up the ruling on that and you will hold up the introduction until you can make the necessary investigation to ascertain what is needed to complete the foundation there; and also that is true with respect to this Strand Garage.

Except for the Wilma Gowns and the Strand Garage, all the others will be received.

Mr. Williams: With that, your Honor, we rest at this time.

(Defendant's Exhibit B for identification received in evidence.)

The Court: He has rested.

Mr. Christy: Your Honor, the Government would like an opportunity to examine the record and prepare for your Honor a brief and oral argument on the Government's motion to dismiss the defendant's motion on the grounds that he has not generally sustained his burden on any one of the three aspects [1173] of the motion as it has been amended.

I would like to adjourn until tomorrow morning, if we may, for oral argument.

The Court: That is quite all right.

Is that agreeable to you?

Mr. Williams: I have no objection to that, your Honor.

The Court: Very well. We will do that. We will adjourn until tomorrow morning, and you will be ready, you say, at that time to go forward with your argument and have whatever brief you desire?

Mr. Christy: Your Honor, after we discussed this yesterday, in contemplating the preparation of a brief, I perhaps underestimated the time it would take to prepare it, and I do not think, your Honor—

The Court: That is the reason I asked you. Are you going to have the brief ready at half-past ten tomorrow morning?

Mr. Christy: I don't think I can have it ready at half-past ten tomorrow morning.

The Court: When do you think you will?

Mr. Christy: I would like, if I may, your Honor, to be permitted to submit it on Monday morning. I would be prepared to go through with oral argument.

[1174] The Court: I know, but what is the argument going to be unless I have the benefit of the brief. If you think that the motion that you are going to make requires a brief, I should think that we are not going to get very far unless the brief is available to me at the time your motion is made. If you are going to take from now until Monday to prepare a brief, you are obviously thinking of calling my attention to a great many matters of fact as they appear in the record and probably some considerable amount of law and cases and so on.

I suppose I ought to be complimented that you think I can do this all so quickly, but I decline the compliment and I should like to have the brief at the same time I have the argument.

Mr. Christy: Your Honor, I do not think that I could have a brief that I would consider—

The Court: I am not pressing you now. I just want to know how much time you want. You see, Mr. Christy, it is

a perfectly simple thing to me. If you are going to argue tomorrow and then have until Monday to file a brief, I do not suppose the lawyer ever lived who did not think of a better argument after he left the Court than the one he [1175] made. It is like after dinner speeches. The one you make on the way home is always better than the one you delivered, and I am sure if we have the argument tomorrow morning and then I get your brief on Monday morning I am going to hear or read a lot of things in there that you have thought about over the intervening days, and then Mr. Williams is not going to be idle during that time either, and then he will come back and it will be one brief and another brief and I think it would be much better if you tried to get your brief ready—today is Wednesday, and I would think if you would have your brief ready by Friday morning and give it to Mr. Williams, and then I am going to give him the opportunity to work over the weekend, and maybe if he has any memoranda that he would want to supply he could have it by Monday, and then we would all be on the target.

Mr. Christy: So we would set Monday for oral argument, then?

The Court: Yes, Monday for oral argument, but your brief to be submitted to Mr. Williams by Friday.

I see Mr. Williams may not entirely agree [1175-A] with me.

Mr. Williams: I wonder if we could approach the bench, your Honor, on a matter unrelated to the—it is related to it but it is a personal matter I would like to talk to you about.

(Discussion off the record, at the bench.)

[1176] The Court: After the huddle at the bench we have come up with what everybody seems to think is a good solution. It probably won't be.

Mr. Christy, you are going to have until Friday afternoon at 4 o'clock to prepare your memorandum, and at that

time you will serve that on Mr. Shilensky's office in New York. Friday afternoon at 4.

Mr. Christy: Very well, your Honor.

The Court: Then Mr. Williams will have from then until Tuesday morning to get a memorandum and we will adjourn now until Tuesday morning.

Is that agreeable?

Mr. Williams: Yes, your Honor.

Mr. Christy: Yes.

The Court: That will be October 22nd.

Mr. Shilensky, do you have some doubt about that?

Mr. Shilensky: Not having heard the discussion at the bench, I don't know where Mr. Williams will be on Friday.

The Court: That is up to you and him.

Mr. Williams: There is no problem. I will be available.

[1177] The Court: Let the record show that this Court's Exhibit 2 which I have been borrowing from time to time from the Government is now re-entrusted in its care.

Also, Mr. Williams, here is your Exhibit Q for identification, which is the transcript of the voir dire. You gave me a copy yesterday of the jurors and alternates. I take it you don't want that back; I can keep that for my notes.

Mr. Williams: Yes.

The Court: We will adjourn now until Tuesday, October 22nd.

Mr. Christy, I am going to turn back to you Court's Exhibit 1, which has now been sealed. That is the report from one of the agents. Have it in court next Tuesday.

I am returning to you also Government's Exhibits 1 and 2 for identification and Defendant's G and H for identification, the latter two to Mr. Williams.

Mr. Christy: May I have photostats made and I will supply Mr. Williams—

The Court: Mr. Williams, Mr. Christy will have photostats made of those cards for you, and he [1178] will keep the originals.

Mr. Williams: That is all right.

What should I do with Exhibit B? I am supposed to leave it in the custody of the clerk.

The Court: Please don't press that question, but I submit that until the motion is submitted, you better keep custody of it—until the question of Wilma Gowns is taken care of, you better hold on to it.

Mr. Williams: All right, your Honor.

The Court: Very well, we will stand adjourned.

(Adjourned to Tuesday, October 22, 1957, at 10:30 a.m.)

[1179] New York, October 22, 1957.
10:30 o'clock a.m.

Hearing resumed.

The Court: Do you have a memorandum?

Mr. Christy: Yes, I do, your Honor.

The Court: The clerk just handed me one from Mr. Williams.

Mr. Christy: I hand one to the Court, your Honor. I received my copy from Mr. Williams this morning.

The Court: And you have served yours on Mr. Williams?

Mr. Christy: Yes, sir, last Friday.

The Court: This is a formidable stack of papers, but that is all right.

All right.

Mr. Christy: Your Honor, before we commence there is one matter I would like to bring to the attention [1180] of the Court. I think, if your Honor has the testimony of the last session before you, I could refer to it very easily.

The Court: What page?

Mr. Christy: Page 1150. Have you got the page, your Honor?

The Court: I do.

Mr. Christy: It was a question which your Honor put to me while I was on the stand and as I heard your Honor's question I answered it. However, upon reading the record, I am not sure that I understood what your Honor had in mind because, if your Honor limited the question to a letter from the Attorney General, my answer would be the same. If your Honor meant to refer to any letter by any person in the Department of Justice at any time, which would be the question about two-thirds of the way down the page, my answer would have to be different.

The Court: Let me go back. I think it starts at 1149.

(Court refers to transcript.)

The Court: Yes. The discussion was concerned with whether you had seen any letter over the signature of the Attorney General or one of his [1181] assistants addressed to the Commissioner of Internal Revenue requesting information concerning the tax returns of prospective jurors, and my question was that, if such a letter had been written, for instance, by the Attorney General, would a copy of that letter be likely to be in the United States Attorney's files, as far as you know.

It seems to me in the context the question obviously was referring to this case. Now, what is your difficulty?

Mr. Christy: Two-thirds of the way down on page 1150 your Honor said:

"Have you ever at any time"—

The Court: "Have you ever at any time in your experience as an Assistant United States Attorney known of any such letter in this or any other case?"

And you said you had never seen one.

Mr. Christy: That is right, your Honor, I have never seen a letter from the Attorney General or the assistant

to the Attorney General to the Commissioner of Internal Revenue in this or any other case.

The Court: That is what you said?

Mr. Christy: I wanted to make sure your Honor was not referring to other persons in the Department of Justice.

[1182] The Court: Well, now, Mr. Christy, I don't propose to be cross-examined. I think the record is going to stand as it is. Your position probably is that you desire to amend that and, if you do, you may take the stand and also such amendment or correction as you wish. I don't propose to be cross-examined.

Mr. Christy: No, your Honor. I don't wish to amend the record in any way. I just wanted to make sure that I understood your Honor's question correctly.

The Court: Well, if you have any doubt about it, you were a witness under oath at the time, and you may take the stand and make any explanation you desire to make.

Mr. Christy: In accordance with what your Honor has just said, I don't feel that that is necessary.

The Court: You may use your own judgment on that.

All right, are you ready to make your motion?

Mr. Christy: Your Honor, at this time the Government moves to dismiss the motion brought by [1183] Frank Costello to set aside his 1954 income tax conviction and for a new trial.

The original papers in this motion were served on November 28, 1956, and the motion was limited in those papers to a claim that the Government had used evidence from illegal wiretapping.

We have now had a hearing which has lasted some ten days, and during the course of this hearing the motion has been amended twice, so that as it stands now there are three prongs on which Costello brings this motion:

Firstly, on the grounds of wiretapping, and, under this point Costello claims that the Government had evidence

obtained from wiretapping by both State and Federal taps, and also that the Government had available to it taps on conversations between Costello and his attorneys at a time when he was preparing for trial.

Secondly, he claims that there was unlawful interference with his mail, and a delay in his mail from which the Government obtained evidence that he used at the trial.

And thirdly, he claims that the jury which convicted him was not an impartial jury because the [1184] Government had access to tax returns of some of the members of the panel from which the Costello jury was selected.

During the course of the hearing Costello has introduced a considerable amount of evidence, and there has been over a thousand pages of testimony. The Government takes the position at this time that on each of these three points he has failed to sustain his burden, and, therefore, the motion should be denied.

I am sure this Court is aware, and, as Judge Goddard said in the Hiss case, motions of this sort are not greatly favored, and the granting of a new trial should be done with great caution.

Now, where a motion is brought on the grounds of newly discovered evidence, generally the defendant must show that such evidence would have resulted in an acquittal at the time of trial. He must show timeliness, that the evidence which he now has could not have been discovered prior to this time with due diligence.

[1185] And as in this case where he attacks the Government's evidence, he must show that the other evidence that was adduced at the trial was not sufficient to sustain his conviction.

The Government's position, of course, is that he has failed to bring his testimony or evidence within any of the accepted criteria by which this Court can grant him a new trial.

Colloquy

Now, on the individual points: I will take up the wiretap point first. On this point as in the others I do not intend to detail for the Court the testimony of the individual witnesses. In its memorandum which has been submitted to the Court the Government has prepared a digest of the testimony of the witnesses on the several points.

On the wiretapping, in order to sustain his burden, Costello must show that wiretapping was illegally employed. He has got to show that the Government made use of information from the wiretaps at the trial or in preparation for the trial and that a substantial portion of the case was derived from wiretapping, and these are the criteria which have been set down in both the Nardone case in the Supreme Court and the Goldstein case, and on [1186] this Costello has failed to sustain his burden.

Breaking down the wiretap point into subsections, we have, first, the wire tapping by federal agents. There has been no testimony that a federal agent ever installed a wiretap on a telephone of Frank Costello or that any conversation between Costello and any other person was ever intercepted by a federal agent.

Mr. Mellin, the former Treasury agent, testified and he talked about a wiretap in New Orleans in 1937, and he said he put in three taps, one on a man named Geigerman, one on a man named Shushan and a third at the Roosevelt Hotel. He was somewhat indecisive, being charitable to him, as to the persons on whom he installed the tap in the Roosevelt Hotel and at one point, when he was asked on whom he had installed a wiretap, he said, "I absolutely don't remember." At another point he said he thought it was on a room in which Kastel and Costello were supposed to stay, but your Honor will recall that Mellin never monitored a tap, he only installed them, he never sat on a tap, so he was unable to say that any conversations of Costello had ever been intercepted, even assuming that there had been a tap on Costello's [1187] phone.

Your Honor will also recall that he testified that it was his practice to put in a record or in books all the taps that he installed, and that he had done that from 1930 on. He said that he had recently looked in the books in connection with this case and had failed to find the name of Costello.

Cheasty, another Treasury agent, testified that with Mellin they had put a tap in the—

The Court: Pardon me. Do you have before you there a note as to the page where Mellin said that he had recently refreshed his recollection from a book?

My recollection is that you had asked Mellin if he had a diary which would show this. He said he had; it was at Poughkeepsie; that he would be glad to make it available at Poughkeepsie if you or one of your associates would go there and check the diary, and when he left the stand that was to be done, I think, over the weekend. Whether it was ever done the record does not disclose.

I have been over most of the testimony and I don't recall any testimony by Mellin that he had checked this diary prior to the testimony and had [1188] found no mention of Costello.

Mr. Christy: My recollection is he said he had occasion to refer to the diary in connection with this case recently—

The Court: I don't want to interrupt your argument. If Mr. Londin or one of your associates here will make a note and call to my attention the page of the record where that occurs, I would appreciate it. It is just that my recollection doesn't accord with that.

Mr. Christy: As far as Cheasty was concerned, he said that together with Mellin they installed a tap on a room in the New Yorker Hotel back in the late '30s, and this was a tap on a room in which Kastel and Costello and a man named Seymour Weiss were supposed to be staying, and Cheasty also testified it was in connection with the Seymour Weiss case.

He also said, as your Honor recalls, that he monitored the tap for a while and never intercepted any conversations between Costello and any other person; nor was there any evidence that any federal agent had ever asked a state agent or agency to install a wiretap, nor any evidence that any federal [1189] officer or agent ever monitored or sat on a state tap.

Now, in the Nardone case and in the Coplon case there was clear evidence there that the federal agents had tapped the wires of the defendant. It was unequivocal. But there is no evidence here that any conversations of Costello with any other person were intercepted by federal agents.

The Court: Pardon me just a minute.

Have you found the page there?

Mr. London: Where his recollection was refreshed since this morning?

The Court: No. I thought you just had it. Never mind.

Mr. Christy: And since there has been no showing of any intereceptions by a federal agent of Costello's conversations, obviously there could be no evidence introduced at the trial which could have stemmed from such interceptions.

With regard to the wiretaps by the District Attorney, the evidence indicates that the taps were put on in 1943, 1946 and ran from some time in 1950 to April 15, 1952.

Mellin did testify that he had had contact [1190] with Lieutenant Grafenecker of the District Attorney's Squad over a period from 1934 to 1949, as I recall, and Mellin said that he had been looking at wiretaps on Costello in '34, '37 and thereafter. Obviously Mellin could not have seen any wiretaps on Costello prior to 1943, with one exception, and that was by reference to three calls, I think, in which Costello had participated in 1939 when the line of the Villanova Restaurant was being tapped.

So Mellin's testimony is not supported by the facts up to 1943 with that one exception.

[1191] Mellin said he was getting information from Graefnecker. Graefnecker said he was giving information to Mellin. But they both said that it was general information, might have come from surveillance, might have come from other sources, and it related to the Costello case as well as other cases.

Mellin was unable to recall any information that he had gotten from any of these taps. He did say that it was his practice to refer to the Treasury agents what information he learned, but he could not recall, of course, any specific information.

Graefnecker recalled, of course, talking to Mellin, and he recalled talking to Treasury Agents Ronayne and Cordes, but, as I recall his testimony, he was unable to state that he had provided these men, Cordes and Ronayne, with any wiretap information.

I think Ronayne testified that he had seen Graefnecker on only two occasions, and he did not recall if anything that he received was helpful, and he did not recall writing it down.

The most you have got on the basis of the [1192] record is that these wiretaps, some of which have now gone into evidence, may have been available and may have been seen by some of the Treasury agents.

There, of course, has been no connection shown between the wiretaps and witnesses at the trial, or, I should say, any use by the Government of any of the information contained in these wiretaps.

Fay, who was the chief investigator at the District Attorney's office, testified that on March 4, 1954 he had made available to Mr. Seymour and to me eight plant cards, and a plant card is a synopsis of what is actually contained on an in-out transcript of a wiretap.

One of these cards showed a call between Costello and the Roosevelt Hotel, and the Roosevelt Hotel was one of the expenditure witnesses during the course of the trial.

This is the only direct link shown between a wiretap and a witness at the trial, that is where the Government has actually seen or saw, prior to trial, wiretap information, and your Honor will recall the testimony of Agent Leath where he said that prior to the time the case was referred to the United States Attorney's office [1193] in 1953, a full year before Seymour and I went to see Fay, Treasury agents had already interviewed people at the Roosevelt Hotel and determined Costello's expenditures there, so that plant cards could not have been the source of any information used at the trial, or any lead.

Now, as I said, there are certain transcripts which have gone into evidence, transcripts which show conversations between the Costello home and persons or firms who testified at the trial, and the testimony shows that these wiretaps may have been seen by Treasury agents, but Costello has failed to show any use by the Government of these transcripts, and he has failed to show that the transcripts were the source of any evidence used at the trial.

In order to shift the burden to the defendant to prove that its case did not stem from wiretaps it is incumbent upon the defendant to show some use by the Government, and this he has failed to do.

Geissler testified that he was assigned the case in June of 1950. He said that at the time he got the file it was a small one. He said that he did get two memos in the file relating to telephone calls, both of which memos are in evidence as [1194] Defendant's Exhibits E and F, but a glance at these memoranda will show that they contain only toll calls, and no information from wiretaps.

Geissler also testified that there was no information in the file when he got it, as best he could recall, about any expenditures of Costello.

Geissler also said that he never got any information from wiretaps, never saw a transcript, never saw a plant

card, didn't use any wiretap information. He said he talked to Cordes infrequently about the case, and that Cordes had never given him any information about wiretaps or discussed wiretaps with him.

The testimony of Mellin, Grafenecker, Ronayne and Geissler would indicate that Cordes might have been in a position to state whether or not there was in the file any wiretap information.

[1195] I call to the Court's attention the fact that Costello has failed to call Cordes as a witness although he was available. So the Government says that the mere fact of information on conversations between Costello and persons or firms who were witnesses does not indicate that the Government made any use of it.

In the Nardone case Mr. Justice Frankfurter said at one point:

"Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

It is hard to conceive, I think, of a situation in which the connection could be more attenuated than it is here, and it would seem that Costello's position is to substitute at this point conjecture for proof, and on this point the Government's position is he has failed to sustain his burden.

Now, the third point under wiretapping is the allegation that conversations between Costello and his attorneys in preparation for trial were available [1196] to the Government. The three attorneys named are Wolf— George Wolf—Leo Fennelly and Joseph Delaney.

First of all, there has been no evidence or testimony that any conversations between Costello and either Leo Fennelly or Joseph Delaney were ever intercepted at any time by any agency.

Colloquy

With regard to Wolf, there are in evidence transcripts of conversations between Costello and Wolf; and Fay, of the District Attorney's office, indicated that, when Seymour and I were with him in March of 1954, he had read to us from 14 additional plant cards, that is, 14 in addition to the eight which he showed us, but I would call to your Honor's attention the fact that Fay also testified that it was his recollection that he had merely read to us the persons or the parties to the telephone conversation without reading what was contained on the plant card.

Also, an examination of the transcripts of calls between Costello and Wolf show that there were no conversations about this trial, no conversations in preparation for this trial. The latest conversation as reflected in the wiretaps was in March of 1952, which was one year before the indictment was returned in this case, and it is hardly likely [1197] that they would be discussing the income tax case at a time one year before the indictment had actually been returned.

The defendant cannot rely on the Coplon case on this point, for there the federal agents had tapped Coplon's line prior to, during and subsequent to the trial. The Circuit Court reversed denial of the motion for a new trial and sent the case back to the District Court to determine if in fact there had been interceptions of conversations between Coplon and her attorneys, saying, if there were such interceptions, there would have to be a new trial; but there is no showing here that the Government had available to it any of the intercepted conversations between Wolf and Costello in preparation for the income tax trial in 1954.

Aso under the wiretapping, I woud call your Honor's attention to the question of timeliness. Under the Hiss case and other cases the courts have said that the evidence must be newly discovered.

In this case Costello knew in 1943 that his wires were being tapped, and it was recalled forcefully to his attention

again in 1951 at the Kefauver hearings. Joseph Delaney, who represented [1198] him at the trial, said that he knew about the 1943 taps then, that is, in 1943, and knew about it in 1951.

Leo Fennelly, who also represented him at the trial, said that he recalled reading in 1943 about the taps and in 1951 about the wiretaps.

Costello testified that he recalled George Wolf making an objection in the Kefauver hearings to the use of the 1943 taps.

Therefore, all three of Costello's counsel, who are certainly able and experienced men, were aware of the wiretaps as well as Costello himself prior to the trial in 1954.

To sustain his burden on this point, this Court has got to be satisfied or must be satisfied that this evidence came to the defendant after the trial and that it was so material so as to provide a different result.

Your Honor, it is hard to imagine a case less deserving of a new trial on the grounds of newly discovered evidence than this one here where all the lawyers and the defendant knew about the wiretaps. What Costello is in effect saying is that nobody thought of it, but this hardly makes it newly discovered evidence.

[1199] The final point on wiretapping is this:

Assuming for the minute that the Government had actually had in its possession, prior to trial, these transcripts which have gone into evidence, and that these transcripts were the source of evidence at the trial, then the question is, is evidence derived from wiretapping conducted by State officers, pursuant to State statute, and acting independently of any Federal officer, inadmissible in a Federal Court by reason of Section 605 of Title 27? That is the question.

Now, the Circuit Court, in May of this year, had occasion to pass on that very point in United States v. Benanti,

and in that case the Court held that such evidence could be used.

And again, in July of this year they passed on this point in a case involving this very defendant. That was the denaturalization proceeding which was brought by the Government and dismissed by the Court on the ground that the use by the Government of wiretap information spoiled the entire case.

In that case the Government had relied on, apparently, the 1943 wiretap of Costello by the New York District Attorney.

[1200] In the Costello case the Court, in July of this year, went even further than it had in the Benanti case and said that the wiretaps in 1943 were done by the State officers without FBI connivance, and then said that the wiretaps were inadmissible, and so is the fruit from them inadmissible.

So the Government says to your Honor, even assuming Costello has sustained his burden on these wiretaps, the motion must be denied under these two recent decisions in the Circuit Court, both of which are set forth in greater length in the memorandum.

We now come to the second point on which Costello brings this motion, and that is the allegation of unlawful interference with his mail. Costello claims that the Government's case at the tax trial in '54 comprised material evidence secured through the unlawful interference of his mail in violation of Sections 1701, 1702 and 1703 of Title 18, and the Fourth Amendment to the Constitution, and Costello has tried to show that (1) a mail watch was instituted, (2) his mail was delayed, and (3) that the Government obtained evidence thereby.

First of all, your Honor, there is no [1201] question about the mail watch, the fact that it was installed being undisputed.

Colloquy

But what was done in the mail watch? The evidence indicates that the postal employees took from the letters addressed to Costello the names and addresses of the addressors of those letters, and, in one instance, one of the exhibits shows, made a tracing.

What the postal employees did is specifically permitted by regulation, first of all. There is no right of privacy of Costello invaded by this mail watch. There is no reason why this information, coming as a result of the mail watch, should not be available to law enforcement agencies, and there is no law that prohibits this disclosure by the postal employees.

This point was passed on in this district in the case of United States v. Coplan, and was held perfectly permissible.

I might point out to your Honor just in passing that there has been no claim that any of the mail of Costello was opened, and the Government's position is that the defendant's rights to be secure in his papers is not or are not violated by this mail [1202] watch, and that the taking of this information from the letters does not violate the Fourth Amendment. In fact, a common sense argument would indicate that his rights are not violated.

The carrier, the postal employees, in order to separate the mail or to deliver the mail, have got to look at the face of the envelope in order to deliver it, and there can be nothing wrong in noting down, turning over to another agent, that information which is contained on the face of the letter.

Now, with regard to the delay of the mail, the Government's position is that there has been no showing that the mail was in fact delayed. There has been no showing that any letter was delayed.

The Government's file of reports from the post office on this mail watch is now in evidence. There are approxi

mately 50 names, as I recall, on that exhibit. Of those 50 there were nine who appeared as expenditure witnesses during the course of the trial, but none of the letters from these nine persons or any other person has been shown to have been delayed.

Costello testified, if your Honor will recall, [1203] that he recalled no delay and had made no complaint about a delay.

And then there was quite a host of witnesses from the post office in New York, and the post office in Port Washington, who were asked about the practice in handling the mail. I don't recall any witness who said that there was, in fact, a delay, and most all of them indicate that in fact there could be no delay under the practice that they usually follow.

There was testimony from a man named McKenna who was the mail clerk at the Majestic Apartments, and he testified that he recalled that on two occasions the carriers had come to him and asked him to retrieve mail from the mail sack, to give it to them, and they would take it back to the post office, note the mail watch, and return the mail the next day.

McKenna testified that he recalled the carrier who asked him this as Johnson, or said it might have been Folson. Both Johnson and Folson testified at the hearing, and both of them denied that this had occurred.

[1204] As the evidence developed it seemed there would be little point in Johnson or Folson asking to have this mail retrieved. The mail which he again spoke about was bulk mail; it came in a sack; it had already been skinned out by clerks. The carriers were not particularly concerned with the bulkmail. They delivered only the special delivery letters, the registered letters and a few letters that may have been missed earlier, but there would be no point, it seems to me, under the evidence as adduced in their asking to have the mail retrieved.

Colloquy

Assuming for a minute that there was a delay at the post office on the mail watch, it is the Government's position that such delay would not violate Section 1701, 2 or 3 of Title 18. I think it is clear from reading these sections that they would apply only when the delay or the detention of the mail was for an unlawful purpose. The delay, if any, at the post office, was for the purpose of effecting a mail watch, and that is a perfectly lawful purpose as provided in the postal regulations.

Now, if there was a resulting delay contrary to these regulations it did not make the mail watch itself an unlawful purpose so as to bring it within [1205] the provisions of Section 1701, 2 or 3.

Now, assuming for the minute that there was a delay at 115 Central Park West by McKenna, it is the Government's position that that did not violate Section 1701, 2 or 3 or the IV Amendment. The postal regulations provide that in the case of large apartment houses there shall be somebody designated to receive and distribute the mail for those persons living in that apartment house.

When the mail was delivered to McKenna, the delivery was complete and it was turned over to a duly authorized representative of Costello at his residence. If, after it had been turned over to McKenna, there was an abstraction, detention or delay it was with the consent and in fact active assistance of McKenna acting as an agent for the defendant.

Further, even if the federal employees, the carriers, retrieved this mail from the mail clerk at 115 Central Park West, that doesn't mean that any evidence obtained thereby is inadmissible against the defendant.

Finally, there has been no proof that the mail watch was the source of any of the evidence adduced at the trial.

[1206] The Court: Haven't you already covered that?

Colloquy

Mr. Christy: I am coming to another point, your Honor.

The Court: All right.

Mr. Christy: As I said before, the mail watch or the exhibit that went in indicated that there were nine persons—

The Court: You have covered that.

Mr. Christy: Yes, but I have to cover it again to make my point, your Honor.

The Court: All right.

Mr. Christy: —there were nine persons who testified at the trial whose names were reflected in the mail watch.

Your Honor will recall also Geissler's testimony on this point, that most of the information that he got from the mail watch was a duplication, that he had already been in touch with the persons whose names were reflected in the mail watch.

As I said a minute ago, the defendant must show that the evidence, newly discovered evidence, would probably produce an acquittal and that the other evidence at the trial was not sufficient.

[1207] Taking these nine names of persons or firms who appear in the mail watch and measuring the expenditures that were proved through them in comparison to the total expenditures proved at the trial, the result is that such expenditures which might have been attributable to the mail watch are vastly below the total expenditures. These expenditures represent only a very small percentage of the total expenditures proved at the trial.

The Court: Was there any testimony as to what was the amount of expenditure testified to by those people whose names appeared in the mail watch? I don't recall that.

Mr. Christy: No, your Honor, but we have the names in the mail watch and we have Government's Exhibit 363C, I think, introduced at the trial of the case.

The Court: Will you indicate that? I recall nothing in the record now.

Mr. Christy: There was no specific testimony, your Honor, as to the amounts which could be attributed to the mail watch, but I think the Court can look at the exhibits—

The Court: Of course I can, but I don't [1208] recall anything in this record calling my attention to this exhibit that you now mentioned. But you have that in your memorandum, do you?

Mr. Christy: Yes, sir.

The Court: You have in the memorandum what the exhibit number is?

Mr. Christy: Yes, your Honor. We have prepared schedules—

The Court: From the trial transcript?

Mr. Christy: Precisely, your Honor.

The Court: Very well. I recall there was testimony here by Mr. Wadden with respect to the various amounts and a total of something below $150,000 of expenditures testified to by witnesses whose names appeared in the plant cards.

Mr. Christy: That is right. He, of course, took that information from the same exhibits which we have used in preparing the figures on the mail watch.

The Court: All right.

Mr. Christy: So on the question of the mail watch there has been no showing, as I said, that the other evidence at the trial was not sufficient to sustain the conviction.

[1209] The Court: Do you have now the total amount testified to by those nine people whose names appeared in the mail watch?

Mr. Christy: They are reflected on page 36 and page 38 of the memorandum, your Honor. Do you wish me to read them into the record?

The Court: No, you need not do that.

Mr. Christy: And so, your Honor, the Government says that on the question of the mail watch the defendant has failed to sustain his burden.

Your Honor, that leaves me with one point to go. I wondered if we might take a recess. I am a little dry. I don't see any water around here.

The Court: I can give you the recess but the other thing you will have to take care of on your own.

All right. We will take a short recess.

(Short recess.)

[1210] Mr. Christy: Your Honor, on that question you asked me about Mellin's testimony, what I was referring to was at page 80 in the transcript where he said that the last time—

The Court: Just a moment.

(A pause.)

The Court: All right.

Mr. Christy: Your Honor, we come now to the final point in Costello's argument. Costello now contends that because of the Federal income tax returns of certain members of the jury panel were examined by Government agents prior to trial, or inspected by Government agents prior to trial, he was deprived of an impartial jury within the purview of the Sixth Amendment to the Constitution.

He also contends that the jury as selected did not represent a true cross-section of the community, and adds that the practice of examining Federal income tax returns of prospective jurors resulted in a governmental intimidation of those jurors.

The Government's position is that there is absolutely no support in the record for any of these contentions.

[1211] The record shows that the returns of approximately 150 of the 350 members of the panel were inspected by an agent prior to trial, and that information from the returns was made available to the United States Attorney's

office, and that this information as well as information from other sources was used by the prosecutor in determining how best to exercise his peremptory challenges.

The Constitution guarantees only that a verdict be rendered by an impartial jury, and historically an impartial jury is one that exercises a full and fair judgment on the issues that are presented to it. There is no evidence here for even a suspicion of evidence that the jury was not an impartial jury.

Now, in a criminal case any private communicate or contact with a jury prior to or during the course of a trial, directly or indirectly, is presumptively prejudicial and the Government recognizes that. That is, of course, if the contact was not made pursuant to the rules of the Court or in accordance with a Court order. But the record here is barren of any proof that there was any contact or tampering directly or indirectly with any member [1212] of the jury panel prior to or during the trial.

In the case of DeCarlo v. Sears Roebuck in 1951 a motion was made for a new trial on the ground that the defendant had employed private investigators to inquire about prospective jurors by contacting their friends and neighbors, and relatives to get information.

The Court there held that such an investigation is immaterial in the absence of any showing that any juror was aware that such investigation was being conducted. The record in this case fails to show that any panel member or juror was aware that his income tax return was being inspected. As I said a minute ago, there is no proof that any prospective juror was interviewed by anyone connected with the prosecution prior to the trial.

The Government takes the position that in the absence of such a showing by the defendant there is no merit to his contention that he did not have an impartial jury.

Now, on the question of the inspection of the tax returns, it is the Government's position that there is nothing un-

ethical, illegal or [1213] improper about such inspection. The only purpose for such an inspection was to have a basis for determining how best to exercise its peremptory challenges, and I think Mr. McMahon testified one of the purposes was to determine if any of the jurors had been in any tax difficulties.

Under the applicable regulations, that is Section 458.204 of Title 26 of the Code of Federal Regulations, which is set forth in the memorandum, tax returns may be made available to the United States Attorney without written request of the United States Attorney in connection with a grand jury investigation, for the purpose of litigation or for the purpose of preparation for trial.

These tax returns were used in preparation for trial, and, while the tax returns themselves were not furnished to the Government, the—

The Court: You mean to the United States Attorney?

Mr. Christy: I am sorry—to the United States Attorney, the information that was furnished from them is, I think, tantamount to their production.

A party to an action, in determining how [1214] best to exercise his peremptory challenges, may consider any information that is legally available to him.

The Government sought information from all available sources, and there was nothing improper in its inspection of the tax returns in this regard. In fact, I think the Government would be remiss in its duty if it did not consider all of the information legally available to it in determining how best to exercise its peremptory challenges.

In the case of Best vs. the United States in 1950, in the First Circuit, the defendant appealed his conviction on the ground, among others, that the trial judge had erred in denying his motion at the time the jury was impaneled to be allowed to inspect and use a report of the Federal Bureau of Investigation of members of the panel, and the Court there affirmed the conviction indicating the defendant

had no right to inspect the investigating reports of the FBI.

Now, on the classification of the jurors, the evidence indicates that the Government, on the basis of the information available to it, classified the members of the jury panel 1, 2 and 3, and there [1215] was testimony that the lower the number the more favorable to the Government.

There is, of course, nothing improper in classifying members of the jury panel for the purpose of exercising challenges, and I point out to the Court that the classification which was done in this case cannot be related solely to the inspection of the tax returns. The classification was the judgment of one person based on the information he had available at the time.

I think that the fact the Government did not select a jury favorable to it by its own classification is indicated from the record. Of the 12 jurors who sat, 8 were classified 1, two as 2 and two as 3, and the Government exercised only five of the six peremptory challenges which it was entitled to.

[1216] If the Government had sought a jury of only those in No. 1, presumably they would have exercised their remaining peremptory challenge to remove the persons classified in 3.

I think that this indicates that whatever classification was made, it was not decided criterion in the selection of the jury.

The law provides for the use of peremptory challenges by both sides, the Government and the defense, without accounting to the Court as to why it exercised its challenges, nor can the defendant here claim that because the Government may have excused persons who might have been favorable to defendant, deprived him of an impartial jury.

With regard to the information which the Government had available to it, Costello cannot now claim that he should

have had access to such information. I do not believe that the interests of justice require—

The Court: Is it necessary for you to discuss that? I don't think that that claim is made.

Mr. Christy: Well, your Honor, in an anticipation of the claim I would like to cover the [1217] point. I have not yet seen his brief.

The Court: I am not going to stop you if you want to go into something that is not claimed.

Mr. Christy: My point is, your Honor, that the prosecutor is not required to disclose this information to the defendant or any notes which the prosecutor may make for the purposes of exercising its challenges.

Your Honor, for all these reasons which the Government has stated, it is the Government's position at this time, following the conclusion of testimony adduced by the defendant, that his motion to set aside the verdict and for a new trial should be, in all respects, denied.

The Court: Very well.

Are you ready now, Mr. Williams?

Mr. Williams: Yes, your Honor.

If the Court please, Mr. Christy has accurately characterized the motion that is before you as a tri-pronged motion on our part. We have urged upon your Honor that the Government violated pertinent sections of 47 USC Section 605 known as the Federal Wiretap statute.

We have urged further on your Honor that [1218] they have transgressed pertinent mail statutes, namely 1701, 2 and 3, and also the Fourth Amendment vis-a-vis the defendant's mail, and we have urged further that they have transgressed the Sixth Amendment of the Constitution and pertinent statutes and regulations in the inspection of the jurors' returns, income tax returns, and in the use made of those returns at the time of the trial.

I should like to address myself, if the Court please, in the same order as Mr. Christy has addressed himself, to these problems seriatim.

Colloquy

First of all with respect to the wiretapping, I would like to just outline briefly the facts as I recall them from the record, and I suppose it is not necessary to say to your Honor that on a motion of this character, being made by the Government to dismiss the case at this juncture, that all reasonable inferences factually should be given to the evidence which has been adduced by us during the course of this hearing. And I suppose also, your Honor, that that rule has a very poignant applicability where it was necessary for us from the very character of the motion to call a great number of witnesses who have an interest not exactly consistent [1219] with that of the moving party here.

Your Honor, the testimony with respect to the wiretapping, as I recall it, came from several witnesses: Mellin, Graefnecker, Fay, Shipsey, Cheasty, Bolich, and finally my asociate, Mr. Wadden who tied together the transcriptions which were offered in evidence.

The testimony of the defendant Mellin, your Honor, I think, is very clear in one respect, and I think it is clear from four specific references in the record to which I should iike to address your Honor's attention:

That he did go to New Orleans, Louisiana, in 1937, and that he did install a tap on a room which was assigned to the defendant Costello and one Kastel.

He testified to this, if the Court please, four times, once at page 36, once at page 39, once at 116, and once at 129. He testified that he did not monitor this tap but that it was put on at the direction of his superior in New Orleans, Louisiana, a man whom he called a Mr. Burford who was in charge of the New Orleans office.

Now, your Honor, beyond this Mr. Mellin [1220] testified that during his service as a special agent attached to the Bureau of Internal Revenue, or other occasions, he installed wiretaps on persons who were expected to be in communication with the defendant in this case.

He testified with respect to a tap that he installed on one Willie Schlime. He testified with respect to a tap that he installed on one Schoenbaum. In each instance when he testified he was meticulous to say that he himself did not monitor the tap, but he was the technical man, but that it was installed at the direction of his superiors for monitoring by other persons.

Now, your Honor, in addition to those interceptions about which Mellin himself testified, we had testimony from the witness Cheasty that in 1936, '7 or '8, and he could not fix the year, he worked on an assignment with Mellin and one Dineen, and that Mellin installed a dictograph on a hotel room in the New York Hotel here in New York which hotel room was being occupied by one Seymour Weiss and by the defendant in this case.

He testified, if the Court please, that the type of wiretap which was installed in that instance [1221] was one which not only was designed to pick up telephone conversations, but also conversations within the room.

Now, your Honor, it is significant that the dates around which these particular taps center, according to the testimony of those persons who had recollections of them, the dates around which they center are the dates which constitute the inception of this tax case from the record and as we see it here at the trial because the earliest expenditures that were offered in evidence were expenditures in the year 1937.

[1222] Your Honor, Mellin also testified that he was in liaison with the office of the New York County District Attorney and specifically with Captain Grafenecker, who was in charge of the police attached to that office. He testified in many instances, and they are all enumerated in our brief pagewise, that he went to Grafenecker's office; that the actual transcripts of the intercepted conversations were made available to him, and that he read the transcript

of conversations in which the defendant Costello himself was a party.

He said that there was a mutual exchange of information between him and Grafenecker through the years. He testified that he introduced his superior, Mr. Cordes, to Grafenecker, and on one occasion took him to Grafenecker's office in the Costello case.

He testified, if the Court please, that this cooperation between the office of the District Attorney and his own office made it unnecessary to install a tap on Costello's line in so far as the Bureau of Internal Revenue was concerned, and he said that by way of illustrating the point that Grafenecker was making available to him any information [1223] that he sought with respect to wiretapped conversations on Costello.

Your Honor, the witness Bolich came to the stand and Bolich testified that from 1946 to 1948 he was the special agent in charge of the New York office, and he said, and I think I quote him exactly, that the Costello case during those years was under intensive and active investigation directly under the supervision of an agent named Cordes.

He said that Cordes was his subordinate and that he was kept reasonably apprised of the conduct of this investigation, and he testified further, if the Court please, that his information was that Cordes was in liaison through Mellin with the New York County District Attorney's office and that wiretapped information was being made available to Cordes in the conduct of the investigation through the conduit of Mellin.

Grafenecker came to the stand and Grafenecker testified that it was his practice to cooperate with all the agencies of the Government which cooperated with him, and he specifically delineated the Bureau of Internal Revenue as one of the cooperating agencies.

[1224] He said that he had contact with the Bureau of Internal Revenue through the persons of Rouayne, Mellin, Keys, McQuillan and Cordes in the Costello case.

He said that it was his practice to make the transcriptions of wiretapped conversations of Costello available to Bureau of Internal Revenue agents who came to see him. He said that they came with reasonable continuity throughout the years he headed the police in the Hogan office, and he specified those years, if the Court please, as from 1940 through 1954.

He specifically testified, if the Court please, that his cooperation in the Costello case postdated Mellin's tenure with the Buerau of Internal Revenue. Mellin retired, the testimony showed, in 1949.

Grafenecker—

The Court: Some time at the end of 1948, I have it.

Mr. Williams: I think that is right. I think he said January, 1949, but his service terminated in the year 1948.

In any event, Grafenecker testified that he [1225] continued to cooperate with agents from the Bureau of Internal Revenue after Mellin's departure from the Bureau and up until the time of his own departure, which he specifically fixed to be February 15, 1954.

Now, your Honor, in addition to this testimony from Grafenecker we had also testimony that on the eve of the trial in this case, to be exact on April 2nd, the chief prosecutor sought and received the grand jury testimony of the defendant Costello in the 1943 grand jury inquiry conducted by the New York County District Attorney into the so-called Aurelio case. We offered that testimony into evidence, if the Court please, and that testimony is literally laced with references to wiretapped conversations, quotations, allusions and confrontations of wiretapped conversations had during the year 1943.

There is further evidence, if the Court please, that two of the assistants who were occupied with prosecuting this case made a visit in March of 1954 to the District Attorney's office and were given access to certain plant cards which were synopses of telephone conversations in which

the defendant himself took part. The transcripts were [1226] multiple. They began in 1943 and ran for a period of about four or five months. They picked up in 1946 and again ran for four or five months. Then they stretched out over a period of about 18 months in 1950 and 1952.

Your Honor, the testimony further showed, as a result of a painstaking analysis of the transcripts and a cross reference to the record in this case, that there were some 40 witnesses or firms from which testimony came in the trial of this case who were parties to conversations recorded in the transcriptions in the Hogan office, all of which were accessible to the Bureau of Internal Revenue agents during their investigation of the case.

Your Honor, Section 605, the federal wiretap statute, of course makes it a crime to intercept and to divulge telephonic communications, but it does more than that because what I call the fourth leg of that statute, the final sentence which begins really after a semicolon, specifically says that:

> "no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or [1227] meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto."

With respect, your Honor, to these state wiretaps, the thrust of our position is that there was a violation of Section 605 in that agents of the United States Government made use of transcriptions of telephone conversations of the defendant in this case when they knew that they had been intercepted, when they knew that they had been taken

in violation of the first leg of 605 outlawing interception and divulgence.

Your Honor, Mr. Christy in his argument alluded to the case of Benanti against the United States decided may 22nd by this Second Circuit Court of Appeals. He alluded also to the case of United States vs. Costello decided in July by the same court.

I first want to call your Honor's attention [1228] to one fact concerning the Benanti case which has not yet been mentioned to your Honor. On October 8th, two weeks ago, after we began this hearing, the Supreme Court of the United States granted certiorari in the Benanti case and did what I believe to be a wholly unprecedented thing. It ordered briefs to be filed within a 10-day period and set the case down for argument on October 24th, two days from now.

So that the Benanti case and the point of law for which it now stands will be passed upon by the Supreme Court of the United States presumably within the next three weeks or four weeks, if the court runs true to form with what it has done in the past year or so, because argument is now set on Thursday of this week in Benanti vs. United States.

Your Honor, in addition to that fact which I want to call to your Honor's attention, I thoroughly feel, your Honor, that the case at bar is not within the ruling of the court on either Benanti or Costello, and I say that to your Honor for this reason:

[1229] The Court: When you refer to Costello there you mean the Immigration case that was decided in August?

Mr. Williams: Yes, your Honor. And I say that to your Honor for this reason:

In the Benanti case we had a situation where State officers tapped a wire, and they thought they were going to come up with evidence of a State violation, but in fact they came up with what appeared to be evidence of a Federal violation, and they passed information on to Federal offi-

cers that a car was going to move that night and that a Federal violation might be taking place, although they did not tell the officers that this information had its origin in a wiretap.

The Federal officers made an arrest and they found evidence of Federal crime. It was not until the trial of the case, it was not until a witness was under cross-examintaion, that the intercepted conversation came out. And so there was no cooperation between the State and the Federal Government in any transgression of Section 605.

Likewise, your Honor, in the Costello Immigration case the evidence that came out was that [1230] in the preparation of the affidavit of good cause prerequisite to the institution of a naturalization case, the Government had secured its evidence from three sources:

1. The Kefauver Committee open hearings wherein the defendant testified.

2. The testimony of the defendant in this case before the Aurellio grand jury of 1943.

3. The testimony of the defendant in this case before the Special Master looking into whether or not Judge Aurellio should be disciplined.

I believe that was before Special Master Sears.

Your Honor, in the Immigration case there was no evidence whatsoever of access by Government agents to transcriptions of telephone conversations. There was no evidence whatsoever of a continuous modus operandi between the police officers in the District Attorney's office and the agents of the Government working on the Costello matter as there is in this case.

There was no use in that case, your Honor, of the actual transcriptions because there was no evidence that the actual transcriptions or synopses [1231] of those transcriptions were seen.

Colloquy

Now I think, your Honor, that the evidence in this case falls within the purview of the term "Federal connivance" as used by the Second Circuit in the decisions in these cases, because I think that a pattern of conduct wherein the agents of the Bureau continuously went to the New York County District Attorney's office and actually read intercepted conversations of the man who was under investigation, and who exchanged information in a spirit of cooperation with the New York District Attorney's office, constitutes what the Court chose to call "Federal connivance" in the violation of Section 605, the connivance being, your Honor, that there was a collusion, a cooperation, a mutual exchange of information violative of the fourth leg of the statute which interdicts the use of intercepted communications.

Now, your Honor, in addition to that, of course, there are the interpretations that were admittedly put on by Mr. Mellin himself, by Federal officers.

Your Honor, Mr. Christy argued to you very forcibly that we had not shown to your Honor that any [1232] specific item of evidence was directly traceable originally to a wiretap, and he argues to your Honor that that is the burden that is placed upon a defendant when he makes a motion of this character, that the defendant must come forward and point out to the Court, first, that there was a wiretap; next, that there was a use of the wiretap; and then that there were specific pieces of evidence which had their birth in the violation of 605.

I submit to your Honor that this interpretation of the law being urged upon you by the Government is greatly at war with the decided cases in this field.

I want to call your Honor's attention, first of all, to a case that was decided in this circuit in 1942, the case of United States v. Goldstein, 120 Fed. (2d) 485, 488. In that case, if the Court please, the Court said this, in referring to the Nardone case upon which counsel relied in his opening remarks:

> "That language cannot indeed serve as a ruling that the prosecution has the burden to show how far its proof has 'an independent origin' but it is consonant with that position, and to some [1233] extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct has the burden of disentangling them and must bear the prejudice of his failing to do so that is, that it is unfair to throw upon the innocent party the duty of unraveling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i.e., 'taps' and some use of them, it should do the rest."

And then, your Honor, the Court specifically passed upon this very point of law. The Second Circuit Court of Appeals in United States v. Coplan in 1952, which is referred to at page 10 of our brief, where Judge Hand, in writing for a unanimous Court, said this:

> "The accused has the burden of proving that the prosecution has in fact 'tapped' his wires; but, if he succeeds in doing so, [1234] the burden falls upon the prosecution to prove that the information so gained has not 'led' directly or indirectly to the discovery of any of the evidence which it introduced."

So, your Honor, I think that the Government's position, for the purpose of the motion being urged upon your Honor at this time, is at war with the decided cases in this circuit on that proposition.

Colloquy

I think, if the Court please, that we have carried the burden of showing violation of Section 605 and of showing—

The Court: What you are arguing now is that you have made a prima facie presentation?

Mr. Williams: Yes, your Honor, in accordance with the cases of Goldstein and Coplon to which I have just alluded.

So for these reasons, if the Court please, I respectfully urge upon your Honor that we have made a prima facie case within the purview of the pertinent statute and within the purview of the decided cases on this point of wiretapping.

Now, your Honor, I would like to pass on to [1235] the second prong of our motion, namely, the mail watch, and, first of all, as I did before, call your Honor's attention to what I conceive to be the pertinent facts.

Your Honor, the witness Geissler took the stand and said that he was assigned to the investigation of this case in July of 1950, and that shortly after he was assigned to the case he instituted a mail watch on the defendant. He testified, your Honor, that he employed the mail watch this way: He would get the names of persons who were writing to the defendant and then he would contact those persons and he would attempt to find out from those persons the subject matter concerning which they were writing to the defendant, and he said at one point that, if there was any resistance in the divulgence of the subject matter, he would confront them with the fact that he knew that they were in communication with the defendant by virtue of the mail watch.

Your Honor, he said—

The Court: Could you suspend for just a moment?

Mr. Williams: Yes, sir.

(Pause.)

[1236] The Court: All right.

Mr. Williams: That testimony was given at pages 402 and 403.

Colloquy

The Court: I think that the actual wording was a bit different. He said he contacted them for the purpose of ascertaining what their relationship was with Costello and that, if they were reluctant to disclose it, he then disclosed to those persons that he had knowledge that they had been corresponding with him.

I suppose it comes to the same thing but it is not quite as sharply etched as you put it.

Mr. Williams: Now, he testified further, your Honor, that in 1950 and 1951 this avenue of inquiry was fruitful. He could not tell us how fruitful it was absent his records.

He testified, your Honor, that the mail watch was kept continuously on Costello, and by that he defined his terms this way: that every two or three months, to use his language, the mail watch was replaced on Costello either at his apartment or at Sands Point.

Now, your Honor, counsel for the Government makes a point that I understand to be that the mail [1237] watch was really de minimis, because only nine or ten expenditures could be traced into the record.

I think that argument collapses, if the Court please, from the very exhibits produced here in response to subpoena by the Government. There were two exhibits relating to the mail watch. The first exhibit, Defendant's No. 1 for identification, which was ultimately offered in the record, constitutes the records of the Post Office Department on the mail watch of the defendant at 115 Central Park West, and when we look at this exhibit we find, if the Court please, that the earliest record that the Post Office Department has of a mail watch is December 26, 1951, and from that we would be led to believe that that is when the mail watch was instituted. That, of course, is at war with Geissler's recollection on the subject.

Then Defendant's Exhibit O was offered in evidence, your Honor, and this is the record from the Bureau of In-

ternal Revenue as to the fruits of the mail watch and we find on this that they were receiving the benefits and the fruits of the mail watch as early as July 7, 1950, showing clearly that the postal records are inadequate, incomplete, and [1238] that some are not available to us.

Then, your Honor, we look through the exhibit produced by the Bureau of Internal Revenue in vain to find a single piece of evidence provided by the mail watches in 1953 and 1954, although we have evidence in hand from the Post Office Department that mail watches were employed in those years by their own records.

The Court: Wasn't there also testimony it was the practice not to make out cards or to list the names of persons whose names occurred in the mail watch if they already had a record of such person?

Mr. Williams: That was the testimony, I believe, of an agent of the Bureau of Internal Revenue who testified, your Honor.

The Court: I think Geissler so testified. In other words, at any time whenever he got hold of a name, if he already had a record of that he didn't make a duplicate card.

Mr. Williams: In that respect, your Honor, I call your Honor's attention to the fact that, for example, in 1950, which is the earliest time at which the mail watch was imposed by the testimony [1239] here and when they would not have had other leads from the mail watch, we find that they have only one or two names of record here as being the fruits and the product of the mail watch then instituted and the testimony in the record, which is not contradicted at this juncture, is that the defendant received an average of 40 pieces of mail a week, which I suppose is perhaps average mail for an average person who is receiving billings at his home.

So I urge this upon your Honor at this juncture to show simply that at this posture we can see that the records are

not complete here and that an argument which goes in the vein made by counsel for the Government that the product of this allegedly illegal operation was de minimis really doesn't hold water.

Now, your Honor, there was testimony here from postal employees, four in number, that there was of necessity a delay in the mail. I don't think and I intend to urge this, if your Honor permits me, I intend to urge it upon you that I don't think this delay is necessary to show a violation here. I think a delay in itself is a violation, but I think, if the Court please, the law and the regulations [1240] will show that there was a violation here whether there was a delay or not. But the fact of the matter is, if a delay is necessary to constitute a violation, there is ample support in the record at this moment for a finding of delay because we had the testimony of Pignataro, of Hines, of Vamvas and of Kowalski, all of whom testified that, from their experience in the postal service, a mail watch resulted in a delay of one delivery to the person whose mail was being watched.

Now, your Honor, we have also, over and above that testimony, testimony from two persons who were employed at the Majestic Apartments, both of whom testified that for two periods of about two weeks each it was the practice of the letter carriers to retrieve the mail that was addressed to this defendant after it had been delivered and to bring it back the next day, and that a mail watch order or a memorandum to that effect had been exhibited in order to execute the plan.

Your Honor, with respect to the pertinent statutes, Section 1701 of the Criminal Code makes it a crime for anyone to retard or delay the mail knowingly and wilfully. Section 1702, your Honor, makes [1241] it a crime, a felony, for anyone to take a piece of mail, a letter, postcard or other piece of mail, from any authorized depository or channel, any letter which has been in the Post Office De-

partment, for the purpose of prying into the business of another, to use the exact statutory language.

Your Honor, it is our position that the Bureau of Internal Revenue was violating that statute this way: As your Honor well knows, Section 2 of the Criminal Code makes it a crime to cause someone to do an act which, if done by one's self, would be a crime, and it makes that person a principal.

It is our position, if the Court please, that the agents of the Bureau of Internal Revenue by their request were causing employees of the Post Office Department to take mail of the defendant out of its regular channel, out of the regular flow of mail business or Post Office business for the purpose of prying into his business, namely, for the purpose of finding out with whom he was in communication and ultimately to find out what their relationships were with him.

Your Honor, Section 1703 is still another [1242] statute which specifically applies to postal employees and makes it a felony for them to delay or detain the mail. It also goes on to make it a felony to open the mail but there is no claim of that being advanced to your Honor.

Now, your Honor, the term "take in Section 1702, when it is used in the statute—

The Court: The term what?

[1243] Mr. Williams: Wherein it says, whoever takes mail from an authorized depository, mail which has been in the possession of the Post Office, whoever takes it from the orderly flow of postal business, that does not mean, your Honor, permanent diversion, does not mean embezzle or steal, because the statute goes on to use that language. Specifically, it goes on to say, after the term "take,"— "or secrets, embezzles, destroys the same."

So the term "take" does not have in its context the comprehension of a permanent conversion, but, rather, a temporary conversion for the purpose of prying into the

business of one whose mail is passing through the Postal Department.

Now, your Honor, counsel alluded to postal regulations, and he said to your Honor that there are regulations in the Post Office Department which authorize a mail watch, and so there are.

But the regulations, your Honor, specifically provide that the watch shall, under no circumstances, delay the mail.

In 1948 the regulations provided, your Honor, that post office employees could impose a watch on mail when they were requested to do so for the [1244] apprehension of a fugitive.

There was another section which said under special circumstances where there is no disruption of postal business and where there is no material cost involved it could do this, namely, impose a mail watch at the request of another executive department.

In 1954, your Honor, a Senate Committee became concerned with this practice, and I think that a brief allusion to the history of this committee will help us in our handling of this statute.

The Court: Well, have you briefed it?

Mr. Williams: Yes, sir.

The Court: Well, depend upon me to read it, will you, please?

Mr. Williams: All right.

In any event, your Honor, the final outcome was that the Postal Department amended the regulations so that today, and since this finding by the Senate Committee, the only time when it is lawful to impose a mail watch is for the apprehension of a fugitive and for no other reason.

And that committee, if the Court please, found [1245] that of necessity a mail watch from its investigation brought about a delay in the mail, and so stated in its report.

Colloquy

Now, your Honor, reference was made to the case of United States v. Coplan, and it was urged upon your Honor that this was a holding at war with the position which we are advancing to your Honor.

But I submit a cursory reading of that case demonstrates the contrary because in the Coplan case the Court found as a matter of fact that there had been no evidence produced in court of a delay, and secondly, that no evidence of any fruit from the watch had been shown, so that on two scores the Coplan motion failed, but implicit in that finding was that had those requisites been shown, possibly a different result would have been reached by the trial judge.

Your Honor, the case of Oliver v. United States, reported at 239 Fed. (2d) at 818 is a case which goes into great detail as to what one who is using the mails may expect in the way of his mail being handled, and it says that while the Post Office Department may, without transgressing the bounds of the Constitution, impose various regulations as to [1246] the handling of mail, nonetheless one who uses the mails and who receives mail has a right to expect that his mail will be handled within the purview and within the letter of the regulations then and there in effect, and that a transgression of those existing regulations and statutes is violative of the rights of the person using the mail, and may call for striking down the evidence as it did in this case.

In this case we had an actual opening, but the principles that were enunciated there, if the Court please, have a very particular applicability to the case at bar.

Now, your Honor, it seems to me that the Government finds itself spiked on the horns of a dilemma with respect to that mail which went to 115 Central Park West, and on which there is testimony that it was retrieved by the Postal Department.

If that mail was in the hands of an agent of Costello, then I submit to your Honor that there was an abrogation of his rights under the Fourth Amendment because that mail was taken back by postal authorities acting under a badge of authority. It [1247] was an illicit seizure of mail which had coursed its way through the Postal Department and was now in the hands of the designated recipient.

If, on the other hand, your Honor, the agents at the Majestic Apartments can be conceivably regarded as the end of the line of the postal delivery service, then they have stepped directly into the teeth of the inhibition of Section 1702, because they have taken mail from an authorized depository for the purpose of prying into the business of another.

So I say to your Honor that regardless of what facet the line of proof is looked at from, that the Government has transgressed either a constitutional right of the defendant, or a statutory right under Section 1702.

Now, your Honor, I am not going to tax your patience by a long reference to those cases which have held from the earliest Fourth Amendment case, the Week's case, the basic philosophical tenet that the Government shall not profit by its own wrongdoing, and that where the Government breaks the rules, that it must be penalized by having the fruits of the violation struck down in so far as admissibility into evidence in a Federal courtroom is concerned.

[1248] I think the analogy between the mail statutes and the wiretapping statute and the Fourth Amendment cases is complete, and I don't think that the Government is even contesting that, or I didn't hear such an argument made, nor did I read such an argument in the brief that was submitted.

So I say, if the Court please, that we have shown an illicit mail watch, we have shown it running, giving the evidence in its present posture the most favorable inference

to the defendant; we have shown it running from July '50 through '54. We have shown that it was on periodically every two or three months. We have shown that it was on two residences. We have shown that it was fruitful in the production of information incident to this investigation. We have shown that it was illicit in scope.

I submit that we have sustained the burden with respect to the mail watch, if the Court please, for the purposes of this motion, and that the burden has now shifted to the prosecution to purify its evidence on this score.

Now, with respect to the final position, your Honor, that we take, namely that there was a [1249] violation of the defendant's constitutional rights, and that there was a violation of pertinent statutory and regulatory language when the United States Attorney ordered the inspection of the income tax returns of the jury panel of July 1954.

First of all I would like to say, your Honor, and I don't say this in a spirit of hyperbole, but I believe that this practice of inspecting the income tax returns of prospective jurors in a criminal case in which the United States is a party is a malignant growth on the whole Federal jury system. Its consequence can only be, if any Court condones it, that people will regard jury service as an evil to be abhored because it will invite down upon them an income tax inspection with a potential investigation.

I say, your Honor, that I think it is a malignant growth in the jury system that needs to be ferreted out because what juror, knowing that his income tax returns are under scrutiny by the United States Attorney's office, will have the courage to hold out, according to the dictates of his conscience, if the dictates run in that way, for acquittal against a majority of his fellow jurors who want to convict? And so, when I use the term, [1250] your Honor—

The Court: Are you aware that in the first count of this very case the defendant was acquitted?

Colloquy

Mr. Williams: I am sorry, your Honor, I didn't hear you.

The Court: Are you aware that the jury in this case acquitted this defendant on the first count?

Mr. Williams: Yes, sir, I am. But I am talking, your Honor, about the sum total of the results in any criminal case, and we all know that a conviction on one count is oftentimes as damaging to a defendant as a conviction on multiple counts.

The Court: Yes, and from your own experience, as you recently disclosed, Mr. Williams, jurors in American courts are not afraid to acquit, and that has been the experience of every one of us that has practiced law for any length of time.

Now, you disclaimed any intention to indulge in hyperbole, and I am afraid that you have missed your target. You may proceed now.

Mr. Williams: Your Honor, in this instance I submit that we have shown an instance of what could become a practice that the Court should not condone. I submit that we have gone beyond that with respect to [1251] this proof, because in this instance we have shown that there was an inspection of the returns of prospective jurors in this case, that such an inspection was requested by the chief prosecutor in the case, that that request was transmitted to the various collectors by the agent in charge of the case.

We have shown that information came back in the form of written reports to one of the agents working on the case and that that information was transmitted to the prosecutor who was in charge of the case and that it was used as a basis of classifying the jurors, and I don't know whether they were classified 1, 2, 3 and 4, or 1, 2 and 3, because I think the record is somewhat in conflict on that score; but, in any event, we know that the lower the classification the more favorable the juror was expected to be to the Govern-

ment's position, and the higher the classification the less favorable; and we know, if the Court please, that the jury which ultimately resolved the issues in this case consisted of eight persons who were in the category described as most favorable to the Government and that the peremptory challenges exercised by the prosecution were all [1252] against persons other than those in the class regarded as most favorable to the Government.

Your Honor, I submit that this practice was a practice which was designed to bring about a jury which was specially conditioned for conviction, and I submit that the means by which this objection was sought was illegal, and I submit, your Honor, that the Government violated statutory and regulatory law in the manner in which they did this because the record at this time does not show—as a matter of fact, it shows to the contrary, in so far as we have been able to probe this subject—that the United States Attorney complied with the appropriate statutory and regulatory law in getting the information on these jurors.

Your Honor, Section 55 of the Code, the Internal Revenue Code, shrouds the income tax returns of all citizens in confidentiality. Then there are certain exceptions, exceptions by Presidential order, and we know that United States Attorneys across the land are benefited by such a Presidential order, but there are certain basic requirements that are spelled out before a United States Attorney may get the information which was received in this case. [1253] Your Honor, they are spelled out pretty clearly in Section 458.67 of the Code of Federal Regulations, wherein it is provided:

> "Any return shall be open to inspection by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for in-

> spection shall be in writing and * * * shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an assistant attorney general or a United States attorney."

Now, the Government cites, your Honor, Section 458.204 and claims they complied with the appropriate regulatory and statutory law and they read to your Honor this language:

> "The return of an individual partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, [1254] or for use in preparation for such proceedings or litigation."

But they do not make reference, your Honor, to the very next regulation which provides for the manner in which such return is to be received.

The very next section, which was in effect at the time that this was done, your Honor, provides that "it shall be upon written application to the Commissioner."

This section was amended and the amendment to it contains the same requisite of a written application to the United States Commissioner spelling out the purpose for which it is sought.

Now, we have, your Honor, only one document. We have a document which went in as Defendant's Exhibit No. P, and in that document a request is made over Agent Leath's signature that the returns of 175 prospective jurors, I believe the evidence shows, be pulled, and

that they be permitted to be reviewed by an agent who will come around, so the letter says, some time during the week of March 15th. But there was no compliance, your Honor, with the basic requirements for the making of this information available to the United States Attorney, and since [1255] there was no compliance with the carefully delineated and spelled out requirements, then there was a violation, your Honor, I submit, both of Section 55 of the Internal Revenue Code and of Section 1905 of the Criminal Code with respect to making information on returns available to anyone except under strict compliance with the pertinent statutory and regulatory language on the subject.

So I say, your Honor, that here we have a violation, a violation perpetrated by the prosecutor's office and as a result of which information was received by the United States Attorney's office otherwise confidential for the purpose of exercising selective challenges on the jury panel. I say, your Honor, that this practice violated the VI Amendment to the Constitution in that a specially conditioned jury was attempted to be obtained as the result of information peculiarly available to the Government and not available to the defendant, peculiarly within the Government's ken and not within the defendant's, which lifts it, I think, your Honor, from the usual cases of FBI investigations and of private investigations, because we all know that any litigant can make a private investigation of a prospective jury panel if he has the list and [1256] so long as he does not make them conscious of that fact and thereby exercise any influence over them; but here, your Honor, we have the Government resorting to a source of information peculiarly within its ken in a tax case, resorting to the income tax returns of the jurors for information concerning the jurors and their own taxes.

I submit, you Honor, that the practice as shown by the record here violated both the VI Amendment to the

Constitution, that it violated the statutes which make those returns confidential, and that it violated the regulations issued under the confidentiality statutes in that there was no attempt to comply because there was neither a written request by the U. S. Attorney to the Commissioner nor was there at any time a spelling out of the reasons for which the returns were sought, and I submit further, your Honor, if it had there been, it would have been clear that the returns were not appropriately given to the U. S. Attorney and that such—

The Court: Your point is under any circumstances, even if they had followed what you claim they did not as prescribed by the statute, that they [1257] wouldn't have been entitled to them?

Mr. Williams: Yes, sir.

So for these reasons, if the Court please, I most respectfully urge upon you that we have—

The Court: You take all the time you want. If you want longer time you may have it. If you want to take your luncheon recess and come back and conclude your argument, you may do that. If you prefer to do that I will wait until you conclude.

Mr. Williams: I was about to conclude, your Honor, by saying that I think that we have on all three facets of our motion made a prima facie case at this juncture calling for rebutting evidence from the prosecution both with respect to the violations of 47 U. S. C. 605, violations of the mail statute and the IV Amendment and violations of the statutes, regulations and the VI Amendment on the jury point.

The Court: Do you desire any time? I saw you making some notes. I mean Mr. Christy. Do you wish to reply?

Mr. Christy: Not orally, your Honor. I don't intend to.

The Court: Do you intend to reply in [1258] writing?

Mr. Christy: I have not had a chance to read the brief submitted this morning, your Honor. I would like the opportunity to read it and to submit a reply, if I may.

The Court: When do you suggest we get together again? I assume you don't want me to make any disposition of the motion until you have had your opportunity to give me whatever argument or additional brief you wish.

Mr. Christy: That is right, your Honor.

The Court: How long will you need?

Mr. Christy: I think within 48 hours I could certainly have for your Honor anything that I intended to submit. If I determine that there will be no necessity of submitting additional information I will advise your Honor as soon as possible, and Mr. Williams, of course.

The Court: Yes, you had better let him in on it. He is interested.

Mr. Christy: Your Honor, we do have some unfinished business. That is the introduction of certain documents which were identified and which Mr. Williams sought

[1258a] The Court: We will take that up, then, at 2:15.

Mr. Christy: Very well.

(Recess taken until 2:15 p. m.)

[1259] AFTERNOON SESSION—2:15 p. m.

Mr. Williams: Your Honor, I have just a couple of loose ends if I might clear them up from this morning. It will just take me about a minute.

The Clerk called my attention to the fact that I had alluded this morning to an exhibit, Exhibit P, which I assumed was in evidence, and he tells me that it was only

marked for identification. It is the letter from Agent Leath to the Albany Collector asking for certain returns to be pulled.

The Court: I thought it was in, too, but if the Clerk says it was not, he is the man that keeps the records, so we better have it corrected.

Is there objection to that?

Mr. Christy: No, your Honor. It was my impression that it had been received.

Mr. Williams: Your Honor, one other thing that I did want to call your attention to and that is that when the moving papers were filed, we attached to the papers a brief that touched on some of the questions that Mr. Christy argued this morning. I saw no need to rebrief those points.

[1260] I have in mind the timeliness of the motion, and I have in mind specifically the Meserosch case which is cited in that brief, which was decided in the Supreme Court last year wherein the Court held that where a motion for a new trial on newly discovered evidence is based upon an infirmity in the Government's proof, that it is sufficient to show that the evidence was of a character that a new trial might, to use the exact language of the Court, "In a new trial the jury might have reached a different conclusion."

Does your Honor have that brief there?

[1261] The Court: Yes. It is part of your papers and it is entitled "Memorandum in Support of the Defendant's Motion."

Mr. Williams: Yes. Those points are covered in that, your Honor.

Finally, it occurred to me at lunch this noon that I may have not made one thing clear this morning, your Honor.

One of the points that I was making was that I don't believe that it is necessary to show prejudice to this de-

fendant on the jury question in order to make the point, because I feel that this practice is analogous to those cases wherein unauthorized persons have been in the grand jury room and courts of appeal have upset convictions in order to—

The Court: Yes, if there is any irregularity there is a presumption of harm to the defendant.

Mr. Williams: Yes. My point was, your Honor, and by one of your questions I thought I might not have made myself clear, that the continuance of this practice might have an unsalutory effect in future cases with future juries in the federal courts.

[1262] The Court: Yes, that is a rather wide field but I take it this defendant need not be the vicarious defendant of all future defendants that there might be. You may argue the point here. You have argued it.

My point is I thought then and I still think that your attempt to get into that other field was unjustified in the light of the history of criminal trials in American courts, certainly in the federal courts. We need not explore that any further. I know what your point is with respect to this case and this defendant.

Mr. Williams: I was making that point, your Honor, without waiving the point that we are making most forcefully, that prejudice was suffered by virtue of the evidence unfolded in this case.

The Court: I understand. Do you have anything to say?

Mr. Christy: Your Honor, I read Mr. Williams' brief in the lunch hour and I do not desire any time to submit a reply brief. I will not submit one.

There are two points that I would like to call to the attention of the Court. One is a statement by Mr. Williams during the course of his oral [1263] argument that the Court in this hearing must draw every favorable inference from the testimony and evidence adduced by the defendant, and with that proposition the Government would quarrel.

I think that in this instance the defendant has a very strict burden as set down by the cases where there is a motion for a new trial, and I do not believe that the Court must or should draw every reasonable inference from whatever evidence he has adduced. He must be governed by the strict burden which has been set down by the cases, as I say.

Secondly, on page 6 of his brief Mr. Williams has given certain figures relating to the expenditures. I would quarrel with those figures. I do not know how Mr. Williams has arrived at them. It was a little difficult—

The Court: That was the testimony of Mr. Wadden, I think, was it not? Mr. Wadden's testimony was he, as I recall it, picked out certain wiretaps which he said bore or contained the names of these individuals or companies, such as Altman, Jensen and others, as I recall, and that testimony came in from those people showing various expenditures, and then [1264] he gave us what he said was the total of $149,000-some-odd, and that was subject to check, but I take it that is what that $150,000 refers to, is it not?

Mr. Christy: That is correct.

It was subject to check and I have prepared some schedules and I do not arrive at any figures near those.

My problem is that we were not able to determine exactly which of the transcripts of the wiretaps would eventually go into evidence, and your Honor will recall that there are three or four of them which are still pending. So we were unable to arrive at any accurate figure. There are three or four, your Honor, which have not yet been received in evidence. There was Wilma Gowns, the maids and the Strand Garage, as I recall, on which your Honor reserved decision.

The Court: I thought the Wilma Gowns had been decided. I thought that had been received. I thought that had been resolved, that question about Wilma Gowns.

Mr. Christy: I don't believe so. The Government objected on the ground there was no showing in any of

the wiretaps of a connection between the [1265] taps marked by Mr. Wadden and Wilma Gowns. Nowhere in the taps does the name Wilma Gowns appear, nor is the number of Wilma Gowns reflected in any of the wiretaps.

The Court: Well, now you can refresh me on this, but my recollection was that there was testimony that the person who called was an employee of Wilma Gowns.

Mr. Christy: Your Honor, I don't recall that there was any testimony specifically. I think that what Mr. Wadden said is that there were calls to a woman named Gloria and then I think he jumped to the conclusion that they were Wilma Gowns. At least there has not been any showing in the record so far that I can recall which would connect these taps to Wilma Gowns.

[1266] The Court: Well, what have you got to say about that, or would you prefer to have Mr. Wadden say something about that?

Mr. Wadden: Your Honor, I think I testified on direct that the calls were to a lady by the name of Gloria who is actually identified as Mrs. John Sherby, and they were to her home phones.

I also testified, your Honor, that she was either an employee or an ex-employee of Wilma Gowns. I have, in fact, investigated, and she was a fitter who did Mrs. Costello's work at Wilma Gowns, and then she went out on her own. She continued to do Mrs. Costello's work, and I felt that there was a natural inference to be drawn that if they were to contact her, naturally it would lead to Wilma Gowns since she was either an employee at the time or she was an ex-employee.

The Court: Well, if she were an ex-employee at the time, that would hardly lead to Wilma Gowns. I mean, that wouldn't be in the evidence, if she was out on her own. However, what is the difference between the figure that you arrived at, excluding the Wilma Gowns and the maids?

Colloquy

Mr. Christy: Excluding the Wilma Gowns and [1267] the maids, and the Strand Garage, I arrive at a figure of about $113,000 because of the way in which I have got it broken down, and I can't give it to you—

The Court: About 113. And you claim that that would not be significant in the overall picture here, is that your point?

Mr. Christy: That's right, your Honor.

The Court: Do you contend that 150 would also be insignificant?

Mr. Christy: I would say that 150 would also be insignificant, although of course more significant than 113.

Also, on page 6 Mr. Williams states—

The Court: What was your argument about the maids?

Mr. Christy: Well, my argument was, your Honor, that there was no showing from the wiretaps that I saw that any connections were had with a maid.

Now, during the recess Mr. Wadden did show me two taps in which a call is reflected, or, I think it says the phone was answered by Estelle, a maid, or answered by Mary, a maid, which was not shown to us last week, but on that I would say it was not [1268] sufficient to establish a connection.

The Court: Well, on that I will overrule you. I will allow in the evidence on the maids, and I don't think the difference that you point out between 150 and 113 under the circumstances you claim that in any event they are insignificant. I will allow in the testimony on Wilma Gowns.

Mr. Christy: Very well, your Honor.

Now, at page 6 Mr. Williams states that expenditures proved during the taxable years directly germane to the indictment in this case, namely '46, '8 and '9 are in the vicinity of $75,000. Even taking the figures most favorable to the defendant, it would be about forty-five thousand, according to my estimates.

Colloquy

The Court: I am not quite sure what is meant by that. Expenditure proven during the taxable years are in the vicinity of.

What do you mean by that?

Mr. Williams: Your Honor, first of all, when Mr. Christy alluded to this, I see that there is a typographical error here, and it should be '46, '7 and '8 and '9. But our computation on that, your Honor, came to—I think it was $74,000. I don't have [1269] it with me today. But we had $149,000 for the '37 to '49 period, and it was $74,000 for this other period. I don't have the computation with me here today. I am sorry.

The Court: Well, your figure is what?

Mr. Christy: My figure, taking all four years, as I guess Mr. Williams say he wants to do, would be about sixty thousand.

The Court: Well, that is argument.

Mr. Wadden: Your Honor, just to clear up the record, we had some confusion about the three garages. I testified that this concerns taps on the G & K Garage, the 68th Street garage, the 69th Street garage.

I would like to inform the Court that Mr. Christy was correct, that actually the expenditure which I testified to under the 68th Street garage should be provable and would be provable by the taps which were on the G & K Garage.

Mr. Rabinowitz, who was the owner of the G & K Garage until some time in '48, was called in to testify as to the expenditures at that garage at that address. Then after he sold it, the new owner, Mr. Kaplan, came in and testified to the expenditures later [1270] in '48 and '49, so therefore, at this time, your Honor, we will withdraw the offer of the taps on both the 68th Street garage and the 69th Street garage and ask that the expenditure which I testified to on the 68th Street garage of $342.52 be transferred to the G & K Garage for the year 1948.

Mr. Christy: Very well, your Honor. That is all right, your Honor.

Geissler said were part of those that contained some information which had been secured from the office of the Commissioner of Accounts, and, as I recall, they seemed to be thought to be quite important in the discussion as to whether Geissler had had 75 cards or ten cards, and whether they refreshed his recollection after he came back here; am I wrong about that?

[1273] Mr. Christy: That is correct, your Honor.

The Court: Where are they now? I think they were turned back to you. They were turned back to the Government. Do you want to look at them, Mr. Williams?

Yes, these cards that I talked about appear to be marked Government's Exhibit 1 and Government's Exhibit 2 for identification.

Mr. Christy: I don't have those here, your Honor. It was not my recollection that Jack Tar was listed on those cards.

The Court: I don't know whether they were either, but let's have them and let's see whether it was or not.

Mr. Christy: Your Honor was referring to Government's Exhibit 1 and 2. I have them here. There is no reference to the Jack Tar Hotel on them.

The Court: Then Government's Exhibits 1 and 2, it is my recollection, were not received.

Mr. Christy: No, they were just marked for identification, your Honor.

My point is this, your Honor—

The Court: I know what your point is and I frankly can't see the force of it. There is some [1274] evidence from which the defendant argues that the Jack Tar Hotel expenses are tied up with the wiretap or the testimony with respect to them is tied up with the wiretap. You contend that the witness Geissler said he did not use that as a source for getting the Jack Tar Hotel, that he got it from some place else.

Mr. Christy: That is correct.

The Court: Very well.

Mr. Christy: Your Honor, one more point.

Although it will not affect the figures greatly, the total figures, I would like at this time to move to strike the testimony relating to the Jack Tar Hotel and the transcript relating to conversations between Costello and the Jack Tar Hotel. That transcript was received in evidence. I would point out to the Court, however, the testimony of the witness Geissler who testified under examination by Mr. Williams that he had not obtained the Jack Tar Hotel as an expenditure from any telephone call, so that there is a definite indication that it did not stem, I think, from a wiretap.

Mr. Williams: Your Honor, the tap to which [1271] Mr. Wadden testified on that score took place on October 9, 1950.

I don't recall at this time what the date was on the toll call slips that he had which I believe he presented to the Court when he was on the stand.

The Court: What exhibits are they?

Mr. Williams: My recollection is that two of those slips, your Honor, never did go into evidence. I think they were made Court's exhibits because they were produced here from—well, I may be wrong about that.

The Court: There are only two Court's exhibits that I recall.

One of them is Court's Exhibit 1, which is the memorandum which Geissler said he prepared prior to his coming to New York when he was asked to set down his recollection as to what he had done, and Court's Exhibit 2 is the actual copy of the jury panel which the District Attorney, the United States Attorney says he worked on.

I think what you are talking about is an [1272] exhibit with the letter I and Exhibit K which were marked for identification. Those were cards which I think Mr. Christy produced, and my recollection is that they were cards which

The Court: Does that mean that the defendant must suffer from the striking of the testimony from which he wants the Court to infer that his claim is the correct one rather than the claim you make? There is an issue there and it is going to require a finding by the Court.

Now, of course, if you strike only one side of the testimony, the finding is obvious, but I don't see the logic of your argument that merely because there is conflicting testimony the side that you find distasteful should be stricken.

Mr. Christy: I don't think there is necessarily conflicting testimony. My position is that there is a direct indication from Geissler's testimony that the wiretap was not the source of the information with regard to the Jack Tar Hotel.

[1275] The Court: Doesn't that raise an issue of credibility? Mr. Williams and his client are not going to accept and urge the Court to accept everything that the witness Geissler said. You are going to urge that everything he said be accepted at face value.

Mr. Christy: This is by Mr. Williams' own witness that he elicited this information.

The Court: Mr. Christy, his own witness. Every witness that he called here was for the most part an employee of the Government, and it is the merest verbalism to call those his witnesses. They are Government employees.

In any event, we could continue to discuss this and it might be very interesting but I think I will have to make a decision on it and deny your motion to strike that testimony.

Mr. Christy: Very well, your Honor.

The Court: Gentlemen, in view of the briefs which you have given me and which I have tried to look at in the short space of time that we had available between the ad-

journment and our reconvening, and during which I also thought it would be permissible if I had a bite of lunch, I have been unable to come to any [1276] conclusion and all I can do it reserve decision on this motion.

Do you wish to go ahead?

Mr. Christy: No, your Honor. The Government would prefer to await a decision by the Court before putting any evidence that it might want to introduce.

The Court: Do you recognize that that may take some time?

Mr. Christy: I realize that may be a possibility, your Honor.

The Court: I assure you that it is not only a possibility it is a probability.

Mr. Christy: Your Honor, otherwise we might be in a position of offering evidence on a point on which there would be no need to offer evidence in view of your Honor's ruling.

The Court: Of course, that is a problem that happens in every case where a motion to dismiss is made and decision reserved. What makes the problem acute here is that this isn't the ordinary kind of case. You have the special problem here that this defendant who has been found guilty and whose conviction has been affirmed is now out on bail and, under [1277] the ruling, is going to remain at large on bail until the disposition of the motion.

If you want to stand by and do nothing until you get a decision on this motion, I take it that Mr. Williams will not be knocking down the doors to get a decision immediately.

Am I correct in that assumption, Mr. Williams? I mean having in mind that under the prior ruling the defendant will not be disturbed in his present condition of being at large on bail until the decision. But I will hear you as to what your views are on that.

Mr. Williams: I don't know what your Honor wishes me to address myself to.

The Court: The point is this: I have said that I can't decide this motion now and I intend to reserve decision on it. My next question was, to Mr. Christy, whether he wished to now go ahead with any evidence that he desired to put in, and he says that he would prefer, before doing that and before deciding whether he will put in any evidence in any event, to wait until the Court has decided this motion.

Now my question to you is, do you object [1278] to a continuance until that time?

Mr. Williams: No, sir.

The Court: That settles that.

Mr. Christy: Your Honor, in view of the position taken by the Government that the defendant has not sustained his burden on any of the three points, the Government would prefer to have a decision by your Honor before being required to produce any evidence, if it so desires.

The Court: I understand that, but I want to make it perfectly clear that you understand that by doing that the defendant is going to continue to remain at large on bail and that the agreement that you made back in June that you wouldn't call on him to surrender covers this period as well until we can get a decision.

Mr. Christy: I am aware of the statements that I made in June and I would certainly expect to be bound by them.

The Court: Fine. I know you will keep your word. You did keep it up until now.

I wanted to make it perfectly clear that it is your decision to wait until the Court can pass on this motion to dismiss.

[1279] Mr. Christy: That is right, your Honor.

The Court: Very well. So we will adjourn now until such time as the Court has decided the motion, which I shall do as speedily as I can consistent with the other matters that I have in hand, and the decision will be filed.

and then you will take whatever steps you think are necessary in the light of the decision.

Mr. Christy: Very well, your Honor.

The Court: By the way, what about that great, big pile of papers that you and I had some passage about, Mr. Williams, these various taps? You were going to go through and indicate the ones that you wanted in evidence.

When I call them "taps," I mean the actual transcriptions.

Mr. Williams: We have done that, your Honor. We have flagged every one and we have indicated the expenditure to which it is relevant so that in the event your Honor wishes to look at an interception regarding a specific expenditure it can be found with a fair degree of readiness, and we also have prepared what your Honor did ask me to do, an index of these for you. It will be ready tomorrow [1280] for you.

The Court: These transcriptions that have been flagged have not yet been received in evidence.

Mr. Williams: I think they have, your Honor. Your Honor said they would be received save for the ones which Mr. Christy was specifically objecting to, and now I understand we have resolved those specific objections.

The Court: Those were the ones we just discussed before?

Mr. Christy: That is right.

The Court: The ruling on that is made.

Then B-1—is that what it is?

The Clerk: B-1 to B-7, inclusive.

The Court: B-1 to B-7, inclusive, then, are now received in evidence.

(Defendant's Exhibits B-1 through B-7 for identification received in evidence.)

The Court: How about C? Those were the cards.

Colloquy

Mr. Williams: We didn't mark those. We withdrew that offer.

The Clerk: C-1, 2, 3.

[1281] The Court: You are not offering them?

Mr. Williams: No.

The Court: So the record, then, is complete.

Mr. Williams: Yes.

The Court: I am not to get any more memoranda, then, on this motion. You are not going to file any more.

Mr. Williams: No.

The Court: And you have just said you don't want to file any more.

Mr. Christy: That is right.

The Court: All right.

Mr. Williams: Shall we leave all the exhibits with the clerk?

The Court: I didn't hear you.

Mr. Williams: Shall we leave all the exhibits now with the clerk?

The Court: Yes.

(Pause.)

The Court: I wish, gentlemen, before you leave, that counsel would get together on the exhibits and make sure that all of the exhibits that are in are here and then I want them brought to my chambers.

(Adjourned.)

Opinion of McGohey, D. J.

Appearances:

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[1349] The defendant, who was convicted in May, 1954 for willful attempts to evade income taxes, has moved to set aside the conviction and for a new trial, on the ground of newly discovered evidence. A hearing was held at which he introduced voluminous [1350] exhibits and the testimony of 29 witnesses in addition to his own. Upon the conclusion of his presentations, the Government moved that his Motion be denied and his claims dismissed on the ground that he had failed to make a prima facie case. At the Government's request, the hearing was adjourned pending decision on its motion.

On the facts and conclusions hereafter set forth, the defendant's motion is in all respects denied.

The defendant's motion, initially, was grounded on two claims: that at his trial the Government introduced material evidence which was the fruit of illegal wire taps; and that the Government "had available to it the content

of intercepted telephone conversations between (him) and his counsel concerning their preparation of his defense" thus denying him "effective assistance of counsel and the fair administration of justice."

During the hearing the defendant twice requested and was granted leave to amend his motion by alleging additional claims. The first of these was that, at his trial, the Government introduced material evidence which was inadmissible because obtained through unlawful interference with his mail in violation of Title 18 U. S. Code, Sections 1701, 1702, 1703; and the Fourth Amendment of the United States Constitution. The second was that, prior to his trial, Government agents had inspected the income tax returns of the persons on the panel of jurors drawn for the term of court during which he was tried; that this constituted a violation of [1351] the "statutes and regulations dealing with the confidentiality of income tax returns" and resulted in a trial jury which did not represent a true cross-section of the community, thus depriving him of an impartial jury in violation of the Sixth Amendment of the United States Constitution.

The indictment on which the defendant was tried was filed on March 11, 1953. It charged wilful attempts to evade payment of income taxes due in each of the years 1946 through 1949. After a trial which lasted from April 5 to May 13, 1954, the jury acquitted him on the first count, which related to the year 1946, and convicted him on the remaining counts, each of which related to a subsequent year. He was sentenced on May 17, 1954, to a term of five years on each count, to run concurrently, and to pay a fine of $10,000 on each count and the costs of prosecution. The Court of Appeals reversed as to the second count and affirmed as to the third and fourth count.[1] The Supreme Court granted certiorari, but only to review

[1] 2 C. 221 F. 2d 668.

the sufficiency of the evidence before the grand jury, and affirmed[2] on March 5, 1956.[3]

[1352] The claims will be considered in order.

I

Evidence Obtained Through Wire Taps

During the years from 1934 and 1937, Mellin, an Internal Revenue Agent, installed taps on the telephones of persons in New York who were believed to be associated with Costello. Of these persons he recalled but one, named Schlime, on whose telephone he installed a tap in 1937. Some time during that year he was sent to New Orleans where he worked for one week on an investigation which resulted, some years later, in an indictment in New Orleans charging Costello, his known business associate Kastel and others with conspiracy to evade wil-

[2] 350 U. S. 359.

[3] Costello, having been denied bail pending appeal, by this Court and the Court of Appeals, surrendered on May 17, 1954. Shortly thereafter, in a series of income tax cases in which, as in this, the prosecution had been built on the "net worth—expenditures method", the Supreme Court granted certiorari to review the propriety of that method of proof. See *Holland* v. *U. S.*, 348 U. S. 121 at 125. Because of this, the late Justice Jackson, on June 18, 1954, admitted Costello to bail. Subsequent to the Supreme Court's affirmance of his conviction and the denial of several motions for various forms of relief, Costello again surrendered on May 14, 1956, and served until March 11, 1957, when the Supreme Court again admitted him to bail pending decision on his appeal from the denial of a motion to set aside his sentence on the ground that it was greater than the court had power to impose. This was decided against him on June 3, 1957, 353 U. S. 978, after his present motion was filed. He is still free on bail, with Government consent, pending decision on his present motion.

fully, income taxes due from Kastel.[4] While there he installed taps on the telephones of two persons who were believed to be associated with Costello, and also on a telephone in a hotel room which he assumed was to be occupied by Kastel.

[1353] Upon his return to New York, Mellin was assigned to assist in investigations involving several persons of whom Costello was one. He recalled but one tap, installed by him thereafter; which related to the investigation of Costello. That was in 1948, on the home telephone of an Internal Revenue Agent named Schoenbaum who was suspected of consorting with Costello. He installed this tap merely to ascertain if Schoenbaum was then at home, and promptly removed it when he learned Schoenbaum was out. This did not result in the interception of any conversation to which Costello was a party.

There were two additional taps installed by Mellin which he did not mention. One of these was testified to by his former superior, Ronayne, at whose direction Mellin, in 1937 or 1938, installed a tap on the telephone of an unnamed person, other than Schlime, believed to be an associate of Costello. Ronayne did not listen in on this tap and did not recall what information, if any, was obtained through it. He could not recall ever receiving any purported transcription or recording of conversations intercepted through this tap. The second additional tap by Mellin was testified to by Agent Cheasty. This was installed in 1936 or 1937 on a telephone in a hotel room in New York City. It was made in the course of an investigation of one Seymour Weiss of New Orleans who, it was expected, would occupy the room with Costello and Kastel. This tap was so devised that the telephone instrument [1354] served as a dictograph capable of picking up conversations within the room as well as those

[4] The trial resulted in a directed verdict of acquittal.

which passed over the telephone wire. Cheasty monitored this tap "part of the time," but did not overhear any conversation of or concerning Costello. The other agent who monitored it, one Dineen, was not called. Cheasty's recollection was that the tap "didn't pick up much."

Mellin did only the mechanical work of connecting the wires for taps. He never listened in on any of the telephones he tapped, except Schoenbaum's. He did not know whether any conversation in which Costello participated was ever intercepted by means of any of the taps he installed.

Mellin could not recall ever having been instructed by a superior to tap a telephone of Costello.

When asked if he had ever installed a tap on a telephone of Costello, he answered "I absolutely don't remember." He kept a diary in which he had recorded all the taps he had ever installed. While this was not offered in evidence, he had consulted it shortly before testifying and did not find the name of Costello listed among those whose telephones he had tapped. Mellin was by no means a reticent or unwilling witness concerning his activities as a revenue agent. Indeed, shortly after his retirement he wrote an article concerning them which was published in a popular weekly of national circulation. While on the stand he was obviously anxious to tell of his activities in all the investigations of newsworthy [1355] persons in which he had participated. More than once he had to be admonished to answer responsively. It is to the last degree unlikely that he would have neither record nor recollection of tapping the telephone of a man as widely publicized as Costello, if he had ever done so. Under the circumstances there is no rational basis for an inference that he did so.

Mellin, in the course of his investigations, regularly obtained from Capt. Grafenecker of the New York Police Department, information about Costello which Mellin

brought back to his superiors. This practice began in 1934 and continued until Mellin's retirement in January, 1949. While still in service he introduced two of his superiors, Ronayne and Cordes to Capt. Grafenecker who, from time to time thereafter until he retired in February, 1954, was visited by these and other agents.

Some, though not all, of Grafenecker's information had been secured through taps which the New York police had installed from time to time on Costello's home telephone and on telephones in restaurants and other places believed to be frequented by Costello and persons known or believed to be his associates. The New York police were conducting a continu.. g investigation begun during the early days of the prohibition era, of many persons including Costello. They had available, however, and they used, other sources of information besides wire taps. Capt. Grafenecker gave Mellin and the other Internal Revenue agents who sought his [1356] help, "everything (he) had" regardless of its source and permitted them to read the transcriptions of intercepted conversations over Costello's telephone and to make notes of their contents.

Ronayne received information directly from Grafenecker "once or twice" in 1937, but this was in connection with the New Orleans case. The information was given to Ronayne orally and he could not recall what it was, or whether he had recorded it. He thought he had not. He knew that the New York police had tapped Costello's home telephone.

Ronayne, who resigned from Government service in 1945, did not work on the active investigation which resulted in Costello's indictment here in 1953. That investigation was commenced in July, 1950 by Agent Geissler at the direction of his supervisor, Cordes. The latter, though apparently available, was not called by Costello at this hearing. G afenecker could not s cifically recall giving information to Cordes. However, he thought he had; and, in view of his long established practice, it is at least an

evitable inference that he did. When Geissler commenced his investigation he found in the files, only a small one relating to Costello. This contained only general information consisting of newspaper clippings, some memoranda, a list of names, some notes in Cordes' handwriting and a list of toll calls made over Costello's home telephone. The latter list had been furnished by the Commissioner of Accounts of the City of New York. It did [1357] not include either summaries or transcriptions of intercepted conversations.

All of the Government agents, including Mellin, called by Costello, swore they had never asked the New York City officials to tap his or other telephones and had never assisted either in installing or monitoring such taps. Capt. Grafenecker swore to the same effect with respect to these and all other Government agents. This testimony was neither contradicted nor weakened in any way. Having seen and heard the witnesses, I accept their testimony and find that all the taps by city officials, which are involved here were made and monitored by them alone and without the request or assistance of any kind, of Government agents.

Costello has failed to show (a) that at any time his telephone was tapped by federal agents; (b) that any conversation in which he participated over any telephone was ever intercepted by federal agents; (c) that any evidence adduced against him at the trial resulted, either directly or indirectly, from the interception by federal agents of any telephone conversation in which he participated.

Costello introduced no records relating to taps on his telephone by New York police prior to 1943, although presumably it was for this purpose that he had subpoenaed the wire tap files of the Police Department. A Deputy Police Commissioner who appeared in answer to the subpoena, was excused by Costello [1358] and never recalled.

Grafenecker testified he "had a consistent pattern of intercepting Costello's conversations from 1943 on." He testified entirely from recollection, unrefreshed by records,

and if, as Costello contends, he meant by this that there was a continuous tap on Costello's telephone from 1943 to 1954, he was clearly mistaken. He swore that after 1943, all the taps on Costello's telephone were made pursuant to court orders issued at the request of the New York County District Attorney;[5] and that the latter had all the records of all such taps, including all transcriptions of the conversations intercepted by means of them. All of these records were produced by the District Attorney pursuant to subpoena and were examined by Costello's attorneys. They were all marked for identification and he offered 242 transcriptions, which were received in evidence. The records disclosed no taps on Costello's telephone after April 15, 1952, and before that date, during the following periods only: May 7 to November 5, 1943; June 11 to September 10, 1946; September 29, 1950 to April 15, 1952. The District Attorney's chief investigator for the last ten years, who has charge of all wire tap records, swore that he had produced every record in his office relating to taps on Costello's telephone and that after 1942 there were no such taps other than those noted above. I accept this testimony and find accordingly.

[1359] At Costello's trial, the prosecution had to establish his net worth at the beginning of each of the years 1946 through 1949 and to show his expenditures in each of those years.[6] In order to establish his net worth as of January 1, 1946, the prosecution started with his sworn statement voluntarily given, in the presence of his counsel, to Bonayne on October 18, 1937, that on that date his net worth was $40,000. The prosecution then showed that this increased in each succeeding year up to 1946. This process,

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[5] Such orders are authorized by § 813-a, New York Code of Criminal Procedure.

[6] Familiarity with the net worth—expenditures method of proof is assumed. It is described in 348 U. S. at 125 and in 221 F. 2d at 670 ff.

of course, included proof of his expenditures during that period also. The aggregate total of annual expenditures proved at the trial for the period from October 18, 1937 through 1949, was $622,000. Of this sum, the total paid to all those whose names were mentioned in conversations intercepted by New York police officers between May 7, 1943 and April 15, 1952, was at most $155,000.[7] Almost half of this amount, however, that is, $68,800, was made up of fees and disbursements to lawyers whose professional [1360] services to Costello were matters of public record long before the indictment was filed.[8] Accordingly, the total of expenditures the evidence of which can be claimed to have been secured only from police intercepts, is at most $87,200. In Benanti v. U. S.,[9] the Supreme Court held that "evidence obtained by means forbidden by Section 605 [of the Federal Communications Act], whether by State or Federal agents, is inadmissible in Federal Court." It is by no means certain, however, that even under this ruling the trial evidence as to each item of the $87,200. was inadmissible. The evidence at this hearing shows that many of the recipients of the pay-

[7] All amounts are stated in round numbers. The total in the preindictments years was $67,500. In the indictment years it was $87,500. The amounts proved at the trial appear in Exhibits 362C and 362D, "Appellant's Appendix to Brief, Vol. IV, Exhibits" in the Record on Appeal to the Court of Appeals. Those associated with wire taps are taken from the testimony at this hearing of Mr. Wadden, one of Costello's counsel, based on his examination of the District Attorney's wire tap records.

[8] The professional services were rendered by Mr. George Wolf and Messrs. Greenbaum, Wolff & Ernst, a law firm with which George Wolf is not connected. The firm represented Costello in litigation with the Government before the Tax Court in 1943; and later in Treasury administrative proceedings. George Wolf represented Costello at public hearings held by a Senate Committee in 1951 and 1952. He also represented him in 1943, in court proceedings which related to the New York City election of that year and received the widest publicity.

[9] — U. S. —, decided Dec. 9, 1957.

ments included in this amount were never mentioned in any conversation in which Costello was a participant. As to those it is questionable that he has any standing to complain.[10] That question, however, need not now be decided because, in any event, in light of the Court of Appeals' analysis of the expenditures proved at the trial,[11] it is clear [1361] that, even if the evidence were stricken as to all the items which make up the $87,200, there would still remain sufficient expenditures, established by evidence not connected with wire taps, to support the conviction on counts three and four.[12]

Finally, Costello has not shown that the use of wire tap evidence was not known or could not have been discovered prior to the trial.[13] At this hearing he admitted knowing as far back as 1943 that his wire was tapped. There is no rational basis for believing he is so naive as to have supposed that the practice which then proved so fruitful for the State investigation was discontinued. Indeed the transcriptions which he put in evidence here of his conversations after 1943, show unmistakably that he suspected they were being intercepted.

II

Effective Assistance of Counsel Denied by Use of Wire Taps

There is no evidence whatever to sustain this claim which is, as already noted, that the prosecution "had avail-

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[10] *See Goldstein* v. *U. S.*, 316 U. S. 114 at 121, and the cases there cited.

[11] 221 F. 2d 671 through 673.

[12] *See U. S.* v. *On Lee*, 2 C. 201 F. 2d 722 at 723; *Weiss* v. *U. S.*, 5 C. 122 F. 2d 675 at 691, cert. denied 314 U. S. 687, reh. denied 314 U. S. 716.

[13] *See U. S.* v. *Hess*, 107 F. Supp. 128; aff'd 2 C. 201 F. 2d 372; cert. denied 345 U. S. 942.

able the content of intercepted telephone conversations between Costello and his counsel concerning their preparation of his defense," thus [1362] denying him "effective assistance of counsel and the fair administration of justice."

Costello asserts in an affidavit in support of his motion that, "before and during the trial herein I held innumerable conferences, by means of my personal telephone, with my counsel, Joseph Leary Delaney, Esquire, Leo Fennelly, Esquire, and George Wolf, Esquire, concerning the preparation of my defense herein * * *." Such preparation certainly could not have been started prior to March 11, 1953 when the indictment was returned, and there were no wire taps on Costello's telephone after April 15, 1952.

The only lawyers who appeared for Costello in the defense of this case were Mr. Delaney, whose notice of appearance was filed on March 12, 1953, and Mr. Fennelly, who first appeared on a pre-trial motion in November, 1953. Mr. Wolf did not appear as counsel in this case at any time. He was a witness at the trial. He was called by the prosecution and, all objections as to privilege having been expressly waived, testified concerning expenditures by Costello in 1943 and subsequent years.

Costello put in evidence at this hearing, some fifty-four transcriptions of intercepted conversations over his telephone, in which Mr. Wolf participated. The earliest of these occurred on August 2, 1943, and the latest on March 20, 1952. Approximately forty were very brief calls by Mr. Wolf to arrange appointments and he did not always speak to Costello. Seven were very brief calls [1363] by Costello to arrange appointments with Mr. Wolf. In a few instances Mr. Wolf made calls to his office from Costello's home, to inquire of his secretary about other appointments. In a few instances Mr. Wolf called someone at Costello's home whom he addressed as "Bobby". The conversations with Bobby were in no way related to this case. In one call from Costello's home made on March 17, 1951, Mr.

Wolf spoke to Mr. Delaney and advised the latter not to wait for him. Mr. Wolf also inquired and was informed by Mr. Delaney when the "Court of Appeals would next be in session. This conversation occurred two years before this indictment, during the period in which Costello was a witness at hearings held in New York City by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, of which Senator Kefauver was chairman. Mr. Wolf appeared as Costello's counsel at those hearings.

Although Costello's attorneys at this hearing had available for examination and study all of the New York County District Attorney's wire tap records, not one was offered relating to a conversation between Costello and either Mr. Delaney or Mr. Fennelly or between the latter.

On March 4, 1954, one month before the trial started, two Assistant United States Attorneys examined at the office of the New York County District Attorney the latter's records of taps on Costello's telephone. They did not see or examine any summaries [1364] or transcriptions of conversations intercepted in the years 1950, 1951 and 1952, nor were these discussed. They examined only eight cards containing summaries of intercepted conversations of which six occurred in 1943 and two in 1946. None of Costello's lawyers was a participant in any of these eight conversations. The prosecutors also were told by the District Attorney's Chief Investigator, the names of the persons who participated in six additional conversations intercepted in those two years. They were not interested in the latter and they did not examine either the summaries or transcriptions of them. One of them related to a conversation intercepted on August 14, 1946, between Mr. Wolf and the defendant. There was ample reason for the prosecutor to disregard this. It related to one of Costello's financial transactions which he had disclosed to the Government early in 1945.

The transcription of this conversation, though marked for identification, is not one of the 242 he offered in evidence. Nevertheless, I have examined it. It shows that Mr. Wolf asked and received permission to come on short notice to Costello's home with some "statements" concerning a commercial building at 79 Wall Street which Costello then owned. At the trial Mr. Wolf testified concerning the purchase of this property for cash by Costello in May, 1944.[14] Prior to this testimony, the prosecution had introduced Costello's income tax [1365] return filed on March 15, 1945, in which he reported income received during 1944 from the property.[15] Thus Costello had directly informed the Government of his connection with it almost a year and a half before the conversation was intercepted, and almost eight years before the indictment was filed. The conversation clearly did not relate to the preparation of his defense to the indictment.

UNLAWFUL INTERFERENCE WITH THE DEFENDANT'S MAIL

Shortly after Geissler commenced his investigation of Costello's taxes in July, 1950, there was instituted, at his request, a "watch" of mail addressed to the defendant and his wife at their homes. This was authorized by the postal regulations.[16] It was thereafter maintained for periods of

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[14] See Record on Appeal, pp. 939a ff.

[15] *Id.* Ex. 6, pp. 90a, 92a.

[16] Postal Laws and Regulations, 1953 Ed. Title 5 § 41.4(b) provides in pertinent part as follows: "Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addresses nor delayed in delivery. * * *"

two weeks each, every two or three months, until the case was referred to the United States Attorney early in 1953. The two weeks in each period were the last week in one month and the first week of the [1366] following month, the period in which bills are customarily received. The watch covered mail addressed to the Costellos' apartment in New York City and to their country home at Sands Point, Long Island.

A mail watch is conducted in the following manner. When mail is received at a local post office for delivery within its territory, it is sorted by clerks who separate it according to delivery routes in areas where delivery is made by carriers; and according to the addressee's name only, in areas where it is not delivered by carriers but has to be called for by the addressee. The clerks are instructed to observe all mail subject to a watch and to give to a supervisor those pieces which bear the name and address of the sender. The supervisor records these names and addresses, returns the mail to the appropriate route bag or box and thereafter forwards the senders' names and addresses to the official who requested the watch. The foregoing procedure was followed here.

The relevant statutes are the sections of Title 18 U. S. Code set forth in the margin.[17]

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[17] Section 1701:

"Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both."

Section 1702:

"Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person

[1367] It is not claimed and, in any event, there was no evidence whatever that the Costellos' mail was permanently withheld from them; or destroyed, or opened; or its contents examined. It is claimed, however, that this watch resulted in "some" delay and thus the Costellos' mail was (a) "retarded" in violation of Section 1701; (b) "taken" with design to pry into his business or secrets, in violation of Section 1702; (c) "detained" and "delayed" by a postal employee in violation of Section 1703. The Port Washington post office processed the mail [1368] addressed to the Costellos at Sands Point. Residents of that place were not served by mail carriers. They had to pick up their mail from individual boxes assigned to them at the post office. The Costellos' Sands Point mail was not delayed as a result of the watch.

The postal regulations permit delivery in bulk of all mail addressed to tenants in a large apartment house such as that in which the Costellos resided in New York City.[18] Theirs was within the teritory served by the Ansonia sta-

to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another or opens, secrets, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The portion of Section 1703 on which the defendant relies is as follows:

"(a) Whoever, being a postmaster or Postal Service employee, unlawfully detains, delays, or opens any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or secretes, or destroys any such letter, postal card, package, bag, or mail, shall be fined not more than $500 or imprisoned not more than five years, or both."

[18] Title 39 § 97.1 Code of Federal Regulations (Rev. 1955).

tion, which processed and delivered in bulk mail addressed to all tenants in their house. Distribution to the tenants was made by an employee of the house, designated "the mail clerk."

Six clerks and two carriers employed at the Ansonia station during the periods when his mail was subject to the watch and "the mail clerk" and "hall captain" of his apartment house during those periods, were called by Costello to testify about the handling of his mail. He also testified concerning it. He did not say that his mail was delayed at any time. He did say, however, that he had never made a complaint about delay. The testimony of the Ansonia clerks was in conflict. Some said there was no delay. Some said there was bound to be delay. Some said that while delay was possible, it was not inevitable. On this conflicting testimony [1369] I find that, while not inevitable, some delay was probable, but only to a very limited extent, i.e. of such mail as reached the Ansonia station just shortly before the carriers were to start out on their deliveries. Such mail, however, would be ready for the following delivery. As to mail which reached the station after the last delivery on any day and during the succeeding night and early morning hours, there was no possible reason for it to be delayed unless it be assumed the clerks and supervisors made a point of deliberately and systematically disregarding the regulations against delay. There is no possible basis in the evidence for such assumption. As to such mail, therefore, I find there was no proof that it was delayed.

The "mail clerk" at the apartment house testified in substance as follows. On each day during two of the two-week periods, the carrier demanded and retrieved from this clerk all of the Costellos' mail which the carrier then brought back to the station and redelivered the following day. He was not certain whether the carrier who did this was Johnson or Folson, but thought it was the former. Johnson allegedly showed the clerk a copy of the mail

watch directive as his authority for demanding the return of the Costellos' mail. Although the clerk did not say he was given a copy of the directive, the "hall captain" testified that the "mail clerk" not only told him about the carrier's demand, but also showed him the directive. Johnson [1370] denied he had ever shown the directive to the "mail clerk" or retrieved the Costellos' mail. Folson "to the best of [his] recollection" denied the alleged occurrences. The apartment house employees impressed me as being anxious to aid Costello's cause. They are, after all, long-time employees in the house where he lives and, it is fair to assume, have been in the past and expect in the future to be the recipients of his gratuities. The carriers, on the other hand, are not without interest either. They undoubtedly have a motive to deny they violated the postal regulations. Nevertheless their testimony seems more consistent with the inherent probabilities of the situation. While it is possible that, on occasion a carrier may have been directed to check on Costello's mail if the supervisor thought the clerks at the station were not effectively carrying out the watch, it seems incredible that this would have occurred day after day during two separated two-week periods. Moreover there was never any need to bring the Costellos' mail back to the station. Costello testified that his mail averaged only about forty pieces a week; that is, about five or six pieces a day. It would then be much more convenient merely to have the carrier note the necessary data at the apartment house and thus avoid forbidden delay. It is to the last degree unlikely that the supervisor and carriers would publicly expose themselves unnecessarily to complaints from Costello who they would surely suppose would be told by the "mail [1371] clerk" and "hall captain" if day after day his mail was taken back by the carriers. The present Superintendent of the Ansonia station swore that in 37 years in the postal service he had never heard of this being done. The testimony of the "mail clerk" and "hall captain" is rejected.

There was no "taking" of the Costellos' mail with intent to deprive them of it.[19]

It was not prying into their business or secrets to note what the senders had made public on the face of the letters.[20]

And the mere fact of detention without proof that it was for an unlawful purpose is insufficient to constitute a violation of the statute.[21]

Any delay here was merely incidental to a lawful watch authorized by the postal regulations.

The evidence shows no violation of Costello's rights under the Fourth Amendment.

In any event, the total of the expenditures shown to be related to the mail watch was too small to have counted. They amounted to $10,400 in the period prior to 1946 and to $16,800 in the period after 1946. If the evidence as to all those were to [1372] be stricken, together with the expenditures related to the wire taps, there would still remain sufficient expenditures established by untainted evidence to sustain the conviction on counts three and four.

DEPRIVATION OF THE RIGHT TO AN IMPARTIAL JURY

The evidence wholly fails to sustain this claim.

Prior to the trial the Chief Assistant United States Attorney who was in charge of the prosecution requested revenue agents assisting him, to inspect the 1952 income tax returns of the 360 persons whose names appeared on the panel of jurors drawn for the April, 1954 term of court. These agents requested the District Directors of the Lower and Upper Manhattan Districts and the Albany District to make available the returns filed by members of the

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[19] See *U. S.* v. *Maxwell*, 137 F. Supp. 298 and cases there cited; aff'd 6 C. 235 F. 2d 930.

[20] See *Ex parte Jackson*, 96 U. S. 727.

[21] *Fliashnick* v. *U. S.*, 2 C. 223 F. 736 at 738. See also *U. S.* v. *Kirby*, 74 U. S. 482.

panel in their respective districts. Agent Geissler then visited each district office and inspected all the returns made available by the District Director. These amounted to about 150 for the three districts. This is less than half the number of prospective jurors. The reason for the difference was not much inquired into and it was not explained. Geissler, however, impressed me as truthful and reliable, and I accept his estimate of the number he was given to examine. He made notes of the following data on the returns: occupations, amount and source of income, amount of taxes paid, number of dependents, amount of any [1373] refund, and any unusual deductions. The prosecutor, to whom this information was given, used it together with other information in reaching his determinations as to challenges.

Costello makes two contentions as to this. The first is that it violated "the statutes and regulations dealing with the confidentiality of income tax returns." This can be disposed of shortly. The inspection was expressly authorized by Section 458.204 of Title 26 of the Code of Federal Regulations (1949 Ed.).[22] Moreover, since the inspected

[22] § 458.204 USE OF RETURNS IN LITIGATION. The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.

returns were those of others, Costello has no standing to complain about a violation, if there was any, of their rights.[23]

[1374] The second contention is that the inspection resulted in a jury "specially conditioned to return a verdict of guilty." This, as will appear, is completely unsupported by the evidence at the hearing and is, moreover, refuted by the jury's verdict of acquittal on the first count.

The Chief Assistant United States Attorney, for his convenience at the trial, placed after each name on his copy of the jury panel a number, from 1 to 4, and in some instances letters also. No testimony was adduced concerning the significance of the letters, but the numbers represented the prosecutor's order of preference among the prospective jurors. The prosecutor's marked copy of the list was produced and examined by the court together with the trial transcript of the jury selection. The examination disclosed the following facts which were announced in open court.[24] Seven men and five women comprised the twelve jurors who rendered the verdict. They did not include any of the three alternates. Four jurors were housewives and eight were employed in [1375] private industry. Eight were in class one, two were in class two, two were in class three. The prosecutor exercised only five of the six peremptory challenges permitted him. Of those he challenged, two were in the second and three were in the third class.

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[23] See *Goldstein* v. *U. S.*, 316 U. S. 114 at 121.

[24] The list, which was not made available to the defendant for the following reason, was sealed and made part of the record as Court's Ex. 2. It seemed undesirable to expose the panel members to possible embarrassment by disclosing their classifications in circumstances like these, in which such disclosure could not possibly add anything of material substance to the defendant's proof. Since he was informed of the three classes into which the jurors fell and the number of jurors in each class, the identity of those in each class is immaterial.

There is no contention, and certainly there is no proof, that any member of the panel was subjected to surveillance by Government agents either before or during the trial.[25] According to the testimony of the agents and the prosecutors, no person on the panel was told that his return had been inspected, nor was any panel member interviewed by a Government representative either before or, except in open court on the voir dire, during the trial. The defendant, who had available the names of the jurors who passed on his guilt, as well as the others on the panel, did not call any of them to contradict this testimony and so, as there is no other reason to doubt it, I accept it and find accordingly. I also find, on this testimony, that the provisions of the Regulation as to use of the returns and avoidance of publicity concerning them were carefully complied with; and that the sole purpose and result of the inspection was the ascertainment of relevant information about the prospective jurors which the prosecution considered, in confidence, in exercising its challenges.

[1376] At the trial defense counsel were afforded full opportunity, which was exercised, to examine each juror directly, before exercising the ten challenges allowed the defendant. He complains, nevertheless, that he was denied information possessed by the prosecution as a result of the inspection which, if available to him, might have aided him in exercising his challenges. This, however, is not ground for a new trial. The prosecution, to be sure, may not suppress evidence which may tend to disprove the charge on which a defendant is being tried.[26] But the court knows of no rule or ruling, and the defendant has cited none, which requires the prosecutor to divulge the data which he relies on in challenging prospective jurors.

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[25] See *Sinclair* v. *U. S.*, 279 U. S. 749; *Rubenstein* v. *U. S.*, 10 C. 227 F. 2d 638.

[26] See *Alcorta* v. *Texas*, — U. S. —, decided Nov. 12, 1957.

Opinion of McGohey, D. J.

The defendant's motion to set aside his conviction and for a new trial is in all respects denied.

It is So Ordered.

Dated: New York, N. Y., December 16, 1957.

JOHN F. X. McGOHEY
U. S. D. J.

[1377] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 141-9

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UNITED STATES OF AMERICA,

v.

FRANK COSTELLO,

Defendant.

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McGOHEY, *D. J.*

The opinion filed her in on December 16, 1957 on the defendant's motion for a new trial, contains a typographical error in the third line of the last paragraph on page 23. The figure there stated as "$10,400." should be "$104."

The opinion is herewith corrected accordingly.

It is So Ordered.

Dated: New York, N. Y., December 31, 1957.

JOHN F. X. McGOHEY
U. S. D. J.

Notice of Appeal

(Record, pages 1440-1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 141-9

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UNITED STATES OF AMERICA

vs.

FRANK COSTELLO,

Defendant.

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Name and address of appellant:

Frank Costello
115 Central Park West
New York 23, N. Y.

Names and Addresses of appellant's attorneys:

Edward Bennett Williams
1000 Hill Building
Washington 6, D. C.

Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, N. Y.

Offense: Violation of Internal Revenue Code, Title 26 U. S. C. § 145(b)

The order appealed from is the order entered on December 16, 1957 denying an application by appellant for a new trial based on newly discovered evidence, the orig-

inal sentence having been imposed on May 17, 1954 for a term of five years on two counts to run concurrently and a fine of $10,000 on each count.

Appellant is not now confined, having been released from his original imprisonment under the foregoing sentence on bail pending determination by the United States Supreme Court of the legality of the sentence imposed, which proceeding was determined adversely to appellant (353 U. S. 978). Appellant has continued to be at large pending the determination of the motion for a new trial with the consent of the government.

I, the above named appellant, hereby appeal to the Court of Appeals for the Second Circuit from the above order.

Dated: December 23, 1957

Edward Bennett Williams,
1000 Hill Building,
Washington 6, D. C.

Hays, St. John, Abramson & Heilbron,
By: Morris Shilensky,
A Member of the Firm,
120 Broadway,
New York 5, N. Y.,

Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FRANK COSTELLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Southern District of New York, which denied his motion for a new trial.

OPINIONS BELOW

The opinion of the District Court is reported at 157 F. Supp. 461 (R. 781a-802a). The opinion of the Court of Appeals has not yet been reported (App. 2a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the prosecution may classify prospective jurors on the basis of information derived from their federal income tax returns and use such classification as a basis for exercising its peremptory challenges.

2. Whether a defendant is lacking in "due diligence" when he fails to investigate the possibility that federal officers used state wiretaps to secure evidence against him.

3. Whether 18 U.S.C. §§ 1701-1703 bar the use of evidence derived from a mail cover.

STATUTES INVOLVED

Internal Revenue Code of 1939, Regulations § 463C.34:

> "Sec. 463C.34 Inspection by Government Attorneys.—Any return shall be open to inspection by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in section 463C.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney."

Internal Revenue Code of 1939, Regulations § 463D.4:

> "Sec. 463D.4 Use of returns in litigation.—The return of an individual, partnership, corporation,

or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto."

47 U.S.C. § 605:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in re-

sponse to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

18 U.S.C. § 1701:

"Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both."

18 U.S.C. § 1702:

"Whoever takes any letter, postal card, or package out of any post office or any authorized de-

pository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1703:

"(a) Whoever, being a postmaster or Postal Service employee, unlawfully detains, delays, or opens any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or secretes, or destroys any such letter, postal card, package, bag, or mail, shall be fined not more than $500 or imprisoned not more than five years, or both.

"(b) Whoever, being a postmaster or Postal Service employee, improperly detains, delays, or destroys any newspaper, or permits any other person to detain, delay, or destroy the same, or opens, or permits any other person to open, any mail or package of newspapers not directed to the office where he is employed; or

"Whoever, without authority, opens, or destroys any mail or package of newspapers not directed to him, shall be fined not more than $100 or imprisoned not more than one year or both."

STATEMENT

On March 11, 1953, a four count indictment was returned against petitioner in the United States District Court for the Southern District of New York. The indictment charged petitioner with understating his net income for 1946, 1947, 1948, and 1949, in violation of § 145 (b) of the Internal Revenue Code of 1939. The jury acquitted him under the first count and convicted under the remaining three counts. On May 17, 1954, he was given concurrent five-year sentences and fined $10,000 under each of these three counts.

Petitioner then appealed to the Court of Appeals, which reversed as to count two but affirmed as to counts three and four. 221 F. 2d 668. This Court granted certiorari and affirmed, limiting its review to the validity of an indictment based upon hearsay evidence. 350 U.S. 359.

On November 28, 1956, appellant filed a motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure (R. 16a-22a).[1] An affidavit annexed to this motion alleged that petitioner retained his present counsel in June of 1956 to defend him in a denaturalization case, that counsel discovered the extensive use of wiretap evidence by the government in connection with that case, and that the denatural-

[1] On May 15, 1956, petitioner filed a motion in the District Court for correction of his sentence under Rule 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255 (R. 10a). This motion was denied by the District Court and the Court of Appeals affirmed. 239 F. 2d 177. Subsequently this Court granted certiorari and affirmed on June 3, 1957. 353 U.S. 978. Petitioner's motion for a new trial was held in abeyance pending final disposition of the motion to correct his sentence.

ization proceedings were accordingly dismissed on October 23, 1956.[2] The affidavit went on to allege that as a result of his preparation for trial in the denaturalization case, petitioner's counsel began to suspect that state officers had conducted considerably more extensive tapping of petitioner's telephone than available records indicated and that information so obtained could have been useful to the United States in its tax case against petitioner. After further investigation at petitioner's request, counsel filed the present motion for a new trial.

A hearing was held on this motion before Judge McGohey. Petitioner introduced transcriptions of two hundred and forty-two conversations intercepted by state officers. It was conceded that thirty-eight witnesses in the original prosecution were participants in or were mentioned in the intercepted conversations and that these witnesses testified to expenditures totaling $152,797.[3] Petitioner produced uncontradicted evidence that the New York District Attorney's office had made the transcriptions of these conversations available to the Bureau of Internal Revenue as "a continuing thing," "a continuing situation" (R. 142a-143a).

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[2] The opinion of the District Court in the denaturalization case is reported at 145 F. Supp. 892. The Court of Appeals reversed. 247 F. 2d 384. This Court granted certiorari and reversed the Court of Appeals. No. 494, Oct. Term, 1957.

[3] This figure differs slightly from the figure contained in the trial court's opinion. Judge McGohey found that the total amount paid to recipients mentioned in the intercepted conversations was $155,000, in round numbers. As petitioner advised the court below, this discrepancy apparently resulted from the fact that one of the witnesses gave the court his notes, which contained information concerning three expenditures, totaling $2,075.26, as to which no evidence was offered. The discrepancy, however, is obviously insignificant.

Petitioner also produced uncontradicted evidence that synopses of the intercepted conversations were made available to the Assistant United States Attorneys who tried the original prosecution (R. 420a). Petitioner and both of the attorneys who represented him in the original prosecution testified that they had no knowledge of access to state wiretaps by federal agents until petitioner's present counsel discovered such access in the course of preparing to defend the denaturalization case (R. 652a, 655a, 700a).

Judge McGohey permitted petitioner to amend his motion by alleging that the government employed a "mail watch" to secure evidence in the original prosecution (R. 23a-24a). The testimony showed that employees of the Post Office Department, at the request of the Bureau of Internal Revenue, turned petitioner's mail over to a supervisor, who recorded the names and addresses of the senders and then returned it to the carrier for delivery. The testimony was in conflict as to whether delivery was delayed, and the trial court found as a fact that "while not inevitable, some delay was probable" as a result of the watch (R. 796a). An agent of the Bureau of Internal Revenue testified that the watch was "fruitful" and that he found expenditures by petitioner as a result thereof (R. 264a). Ten witnesses who testified to expenditures totaling $16,872 were named in the mail watch records. Concededly neither petitioner nor any of his attorneys had any reason to suspect that there had been a mail watch at the time of the original trial.

Judge McGohey also permitted petitioner to amend his motion by alleging that the income tax returns of prospective jurors were inspected by the government prior to trial (R. 25a-26a). The evidence showed that

an Internal Revenue agent was ordered to inspect the 1952 returns of the whole jury panel (R. 303a-306a).[4] Information derived from his inspection was transmitted to the Assistant United States Attorneys in charge of petitioner's prosecution, who used it in classifying the members of the panel into four groups designated by the numbers 1, 2, 3, and 4 (R. 546a-548a, 579a-589a). The testimony was that the "lower the number, the more favorable the panel member . . . to the government" (R. 547a). The chief prosecutor used the classification numbers in exercising his peremptory challenges at trial (R. 577a).

Eight of the jurors who ultimately sat were in class 1, two were in class 2, and two were in class 3. Two alternate jurors were in class 1 and one was in class 2. The prosecution exercised two peremptory challenges against jurors in class 2 and three against jurors in class 3. No peremptory challenges were exercised against jurors in class 1 (R. 693a-694a). Concededly neither petitioner nor any of his attorneys had any reason to suspect that any juror's tax return had been inspected until a revenue agent who was testifying at the hearing inadvertently revealed the fact.

At the conclusion of petitioner's evidence, the government moved to "dismiss" his motion (R. 723a). It advised the court that it did not wish to proceed with its proof until this matter had been decided. Judge McGohey took the case under advisement and subsequently handed down an opinion denying petitioner's motion.

The court found that petitioner's allegations on the subjects of wiretapping and interference with his mail

[4] The panel contained 360 names, but the agent indicated that he was able to locate only about 150 returns (R. 304a, 591a).

were supported by the evidence. He concluded, however, that "in light of the Court of Appeals' analysis of the expenditures proved at the trial," there was sufficient untainted evidence to sustain petitioner's conviction under counts three and four. He suggested, moreover, that petitioner knew his conversations were being intercepted prior to trial. He further stated that a mail watch was not prohibited by federal law.

Judge McGohey found that an agent of the Bureau of Internal Revenue had in fact inspected the 1952 income tax returns of the prospective jurors and that the prosecution had classified the jurors in order of preference on the basis of this information, using the classification in connection with its peremptory challenges. The court refused to hold that this practice violated petitioner's rights.

Petitioner thereupon appealed to the Court of Appeals, which affirmed the judgment of the court below. The Court of Appeals held that petitioner did not exercise due diligence to ascertain and exclude evidence obtained by wiretaps, and hence found it unnecessary to consider whether there was in fact sufficient untainted evidence to sustain conviction. The court conceded that petitioner and his attorneys had denied any knowledge of federal access to state wiretapping prior to trial and that these denials were uncontradicted in the record. It held, however, that petitioner had the burden of demonstrating due diligence in discovering the use of wiretap evidence, and that petitioner's knowledge of state wiretapping in 1943 required him to investigate whether federal officers had used state wiretapping to secure evidence against him. On the mail watch issue, the court concluded that there was

no violation of any federal statute and hence that the evidence was properly admitted.

The court went on to state that the tax return point "raises a question of first impression." It decided that inspection of the prospective jurors' returns was permitted by applicable regulations. It further stated that "this court may not assume to proscribe a practice of the United States attorney's office which violates no statute and no rule which the Supreme Court has made in the exercise of its supervisory power over administration in the lower federal courts."

REASONS FOR GRANTING THE WRIT

The court below virtually requested this Court to grant certiorari to review the legality of inspecting prospective jurors' income tax returns. As the court below recognized, this is a question of first impression which calls for the exercise of this Court's supervisory power over the administration of justice in the lower federal courts.

In holding that petitioner failed to exercise "due diligence" because he failed to suspect that the United States Attorney would commit a crime by securing and using state wiretaps, the court below has formulated a radically unsound standard for the granting of new trials. The admissibility of evidence secured through a mail cover presents a third important question of federal criminal procedure which requires review by this Court.

1. The legality of inspecting prospective jurors' income tax returns has never before been passed upon by the federal courts. Petitioner contends that this practice presents serious questions of statutory construction and judicial administration.

Sec. 55(f) of the Internal Revenue Code of 1939, now Secs. 6103 and 7213(a) of the 1954 Code, provided that income tax returns constitute public records, but it further provided that such returns should be open to inspection only upon order of the President or under rules and regulations promulgated by the President. This section went on to make the unauthorized divulgence or examination of returns a misdemeanor.

Sec. 463C.34 of the 1939 regulations, which is still in effect and applicable to the 1954 Code, provides that any return shall be open to inspection by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. It further requires that the request for inspection shall be in writing and shall be signed by designated officials. Cases where the actual return is furnished for use in litigation are governed by Sec. 463D.4 of the regulations, likewise still in effect, which provides that returns may be furnished to a United States Attorney for use in preparation for litigation, or to an attorney in the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General.

The court below has interpreted these regulations to permit wholesale inspection of prospective jurors' returns without any written authorization. Its decision constitutes a *carte blanche* for inspecting the returns of all jurors, witnesses, and litigants in every case, whether civil or criminal, to which the government is a party. In view of the established policy providing for the confidentiality of income tax returns, this interpretation of the regulations requires review by this Court.

Regardless of whether the regulations purport to permit this practice, moreover, there is an important question of judicial administration. The court below has inaugurated a system of trial by "class 1" jurors, classified as such on the basis of information unavailable to the private citizen. The record reveals and the court below found that the government has engaged in this practice in other cases (R. 722a-723a). Even if the jurors in this case may have been unaware that their financial affairs were under scrutiny by the prosecution, future jurors will know of the practice and must inevitably be influenced by it. The representative character of jury panels will be affected by the reluctance of many citizens to serve under these conditions. It is naive to suggest that the honest taxpayer will welcome inspection of his return by federal prosecutors.

Any question which thus touches upon the integrity of the jury process is a question of grave importance. Where the jury is illegally selected, a resultant conviction cannot stand. Cf. *Eubanka* v. *Louisiana*, No. 550, Oct. Term, 1957. If the government had tapped the wires of prospective jurors or searched their houses without warrants to secure information for use in conducting its voir dire and exercising its challenges, like considerations should invalidate a resultant conviction. The applicability of these principles to the facts of the case at bar should be settled by this Court.

Indeed, the court below expressly disclaimed capacity to resolve the question, stating:

> "However that may be, we will not attempt to make a policy-determination as to the propriety of the practice by weighing its aid to law enforcement against its limited curtailment of the privacy of tax returns. For we think this court may not

assume to proscribe a practice of the United States attorney's office which violates no statute and no rule which the Supreme Court has made in the exercise of its supervisory power over administration in the lower federal courts. Cf. *McNabb* v. *United States*, 318 U.S. 332."

2. The court below has passed upon a second significant question in the field of federal criminal procedure in ruling that petitioner failed to exercise "due diligence" in discovering the use of wiretap evidence. Admittedly he knew that state officers tapped his wire in 1943. The trial court held that he had reason to suspect continuing state interceptions thereafter. The record is absolutely barren, however, of any evidence that petitioner or his counsel had the slightest reason to suspect the federal government of obtaining and using these state interceptions.[5] Moreover, no discovery procedure was available to petitioner whereby he could have questioned the United States Attorney or the Bureau of Internal Revenue to ascertain the extent of cooperation between state and federal authorities. It is apparent that such cooperation would never have been discovered if the government had not also used state interceptions in the denaturalization case.[6]

In holding that petitioner's motion is barred for want of due diligence, the court below actually decided two important questions of interpretation under Rule 33 of the Federal Rules of Criminal Procedure. It held that a defendant must show due diligence when he moves for a new trial on the ground of a fundamental

[5] Cf. *United States* v. *Johnson*, 327 U.S. 106, 111-112, permitting review of a "finding of fact" under these circumstances.

[6] Cf. *Coplon* v. *United States*, 191 F. 2d 749, certiorari denied, 342 U.S. 926.

infirmity in the prosecution's proof, and it held that due diligence requires a defendant to anticipate that the prosecution will commit a crime in order to secure a conviction.

As recognized by the Court of Appeals, there are two general rules governing new trials on the ground of newly discovered evidence. Where the newly discovered evidence constitutes new affirmative proof on some issue, the defendant must show as follows: (a) the evidence must in fact be newly discovered, (b) facts must be alleged in the motion from which the court can infer due diligence by the movant, (c) the new evidence must be neither merely impeaching nor cumulative, (d) it must be material, and (e) it must be of such character that in the new trial it would probably produce an acquittal. *United States* v. *Hiss*, 107 F. Supp. 128, 136, affirmed, 201 F. 2d 372, certiorari denied, 345 U.S. 942; *Berry* v. *State of Georgia*, 10 Ga. 511, 527.

Where, on the other hand, the newly discovered evidence shows a fundamental infirmity in the prosecution's proof, as for example in a case of recantation or perjury, the criteria have been somewhat differently characterized: (a) the court must be reasonably well satisfied that a material witness testified falsely, (b) without such testimony, the jury might have reached a different conclusion, and (c) the defendant was either surprised by and unable to meet the testimony or did not know it was false until after the trial. *Larrison* v. *United States*, 24 F. 2d 82, 87-88.

In importing the due diligence requirement of the *Berry* rule into the *Larrison* rule, the court below has decided an important question of interpretation under

Rule 33. This Court has never held that a new trial must be denied because the defendant, although unaware that the evidence against him was tainted, might have discovered the taint by diligent investigation. In *Mesarosh* v. *United States*, 352 U.S. 1, for example, it was never suggested that a new trial should be denied because petitioners might have discovered the unreliable character of the prosecution's testimony by diligent investigation.[7] It should be enough that the conviction was in fact the fruit of tainted proof and that the defendant did not in fact discover the taint until after the trial.

Moreover, the court below went on to hold that due diligence requires a defendant to anticipate that the government will become a law breaker in order to enforce the law. In spite of the fact that the Court of Appeals itself regarded the government's evidence as lawful until the decision of this Court in *Benanti* v. *United States*, 355 U.S. 96, it held that petitioner was deficient in diligence because he failed to divine that the Court of Appeals was wrong and to investigate the possibility that the prosecution might be committing a crime. Petitioner does not suggest that he could have kept silent had he known that the prosecution was offering evidence derived from state wiretapping; but whether he was required to ascertain the existence of such lawless law enforcement presents a serious problem.

The holding of the court below represents a novel and harsh construction of Rule 33, a construction at

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[7] Cf. 352 U.S. at 13, footnote 8, indicating that petitioners were fully aware of Mazzei's testimony before the Senate Permanent Subcommittee on Investigations and could have filed a timely motion for a new trial on the basis thereof.

war with the principles behind the *Mesarosh* decision. The criteria which should control the granting of new trials on the ground of a newly discovered infirmity in the prosecution's proof require definition by this Court.

3. The admissibility of evidence obtained by means of a mail watch has never before been passed upon by a federal appellate court. The trial court found as a fact that delivery of petitioner's mail had been delayed for the purpose of recording the names and addresses of the senders. Concededly the legality of such detention is governed by 18 U.S.C. §§ 1701-1703.

Petitioner contends that such detention constitutes retarding the passage of the mail, which is a misdemeanor under § 1701. It likewise constitutes taking mail matter "with design . . . to pry into the business or secrets of another," which is a felony under § 1702. Finally, it constitutes detaining or delaying the mails, which is a felony under § 1703 if done by employees of the postal service.

Petitioner's position is supported by S. Rept. 2510, 83d Cong., 2d sess., which is reprinted in full at 101 Cong. Rec. 2564. The special committee which returned this report was created by S. Res. 332, 83d Cong., 2d sess., to investigate charges that a mail cover had been placed upon the incoming correspondence of a member of the Senate. The committee condemned the use of mail covers in strong language and suggested criminal prosecution under §§ 1701-1703. Subsequent to the issuance of this report, the Post Office Department amended its regulations to prohibit all mail covers save those to aid in the apprehension of fugitives. Postal Laws and Regulations, 1948 ed., § 41.4; 1956

Postal Manual, §§ 311.1, 311.6, 311.7. See also *Oliver* v. *United States*, 239 F. 2d 818, petition for certiorari dismissed, 352 U.S. 952; *United States* v. *Coplon*, 88 F. Supp. 921, 931.

In holding that the introduction of evidence derived from a mail cover does not entitle petitioner to a new trial, the court below decided a most important question of federal criminal procedure which should be resolved by this Court. It is settled that evidence obtained by federal officers in violation of federal law cannot be used against the victim of their unlawful conduct. If mail covers are prohibited by §§ 1701-1703, evidence obtained thereby is concededly inadmissible. The obvious utility of this investigative device in net worth tax cases, as well as in numerous other types of prosecutions, guarantees that the issue of its legality will recur with increasing frequency until this Court decides the point.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
Counsel for Petitioner.

June, 1958.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of May, one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. CARROLL C. HINCKS,
Circuit Judge.

HON. STEPHEN W. BRENNAN,
District Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FRANK COSTELLO, *Defendant-Appellant*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 281—October Term, 1957.

(Argued March 14, 1958 Decided May 20, 1958)

Docket No. 24997

UNITED STATES OF AMERICA, *Appellee*,

v.

FRANK COSTELLO, *Appellant*.

Before:

CLARK, *Chief Judge*,
HINCKS, *Circuit Judge*, and BRENNAN, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, John F. X. McGohey, *Judge*, 157 F. Supp. 461, denying appellant's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. *Affirmed*.

EDWARD BENNETT WILLIAMS, Washington, D. C. (Morris Shilensky, of Hays, St. John, Abramson & Heilbron, New York, N. Y., and Agnes A. Neill, Washington, D. C., on the brief), *for appellant*.

ARTHUR H. CHRISTY, Chief Assistant United States Attorney for the Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, George I. Gordon and Jerome J. Londin, Assistant United States Attorneys, S. D. N. Y., New York, N. Y., on the brief), *for appellee*.

HINCKS, *Circuit Judge:*

This is an appeal from an order of the District Court which denied appellant's motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.[1] The mo-

[1] Fed. Rules Cr. Proc. rule 33, Title 18 U.S.C.A.

"Rule 33. New Trial

"The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court

tion initially was based only upon a claim of newly discovered evidence allegedly showing that the fruits of illegal wire tapping had been used at the trial. In the course of hearings on the motion, the appellant was permitted by amendment to enlarge his motion to include two further grounds, viz., an allegedly illegal mail watch and an allegedly improper inspection of the tax returns of veniremen on the trial panel on the orders of the United States Attorney prior to the trial.

Appellant was indicted in 1953 for income tax evasion, in violation of Section 145(b) of the 1939 Internal Revenue Code, covering the years 1946 through 1949. After trial upon a prosecution based on the net worth theory he was acquitted on the 1946 count but was convicted on the other three counts. He was sentenced to concurrent five year sentences and was fined $10,000 on each of these three counts.[2] On appeal, this court affirmed the convictions for 1948 and 1949 but reversed as to 1947. 221 F. 2d 668. The Supreme Court, having granted certiorari limited to the question of the sufficiency of the evidence presented to the grand jury, affirmed. 350 U. S. 359.

In May, 1956, pursuant to 28 U.S.C.A. § 2255, the appellant filed a motion for correction of sentence, and the District Court denied the motion. We affirmed. 239 F. 2d 177. The Supreme Court granted certiorari and affirmed. 353 U. S. 978.

In November, 1956, the motion now before us on appeal was filed below. The District Court, after allowing the

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"may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

[2] By virtue of several admissions to bail, appellant, though sentenced in May, 1954, has served but 10 months of his sentence to date.

amendments referred to above and after an extended hearing of appellant's case, upon a comprehensive and carefully reasoned opinion denied the motion. 157 F. Supp. 461.

Wiretap Evidence

The district judge concluded that there was no proof that evidence which the Government had introduced at the trial was the fruit of wiretaps and that at any rate there was enough untainted evidence to support the convictions on the counts for 1948 and 1949. We need consider only his further holding that the appellant has not shown that the use of wiretap evidence was not known or could not, with due diligence, have been discovered prior to the trial.

The federal courts in varying circumstances have used either of two recognized tests or standards to determine when new trials should be permitted. One of these tests was originally laid down in the case of *Berry* v. *State of Georgia*, 10 Ga. 511, 527, where the court listed the following six requirements:

> "1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.: speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness."

The other test was developed in the case of *Larrison* v. *United States*, 7 Cir., 24 F. 2d 82, wherein the following three requirements were specified:

> "(a) The court is reasonably well satisfied that the testimony given by a material witness is false.

"(b) That without it the jury *might* have reached a different conclusion.

"(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." 24 F. 2d at 87-88.

The Government contends that the appellant's motion should be determined by application of the *Berry* rule, while the appellant urges that the *Larrison* rule is the appropriate test.

It has been stated that the *Larrison* rule is limited to cases of "recantation or where it has been proved that false testimony was given at the trial." *United States* v. *Hiss*, S. D. N. Y., 107 F. Supp. 128, aff'd 201 F. 2d 372, cert. denied 345 U. S. 942. But we need not decide whether appellant's claim comes within the *Berry* rule or the *Larrison* rule, or perhaps fits into a category of its own, because the same result is reached no matter which rule is applied. It is well settled that motions for new trials are not favored and should be granted only with great caution. *United States* v. *Johnson*, 327 U. S. 106; *Weiss* v. *United States*, 5 Cir., 122 F. 2d 675, cert. denied 314 U. S. 687. We think it fundamental that a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial. *Nardone* v. *United States*, 308 U. S. 338, 342. See also *United States* v. *Flynn*, 131 F. Supp. 742, where Judge Dimock reached the conclusion that the *Larrison* rule "like so many of the other rules in our law, requires due diligence of him who invokes it."

Did the appellant or his counsel exercise due diligence at the trial to ascertain and exclude evidence obtained by wiretaps? In this connection the record shows that in 1943 the appellant admittedly had been made aware of the fact

that the District Attorney for New York County had placed wiretaps upon his phone. This was again brought to his attention in 1951 in the course of the much-publicized hearings of the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce—the so-called Kefauver Committee. As a witness in the proceedings below, the appellant testified that this 1943 use of wiretaps by the state authorities had been known to him, in 1954, at the time of trial. And also in the proceedings below lawyers who had represented the appellant at his trial testified that they too had known of these earlier 1943 taps. They also must have known the rule of the second *Nardone* case, *supra*. But the appellant and these lawyers all denied that prior to the trial they had known that federal Internal Revenue agents had access to the wiretap information in the possession of the New York County District Attorney. And these denials seem not to have been expressly contradicted on the record.

However, in spite of knowledge of earlier wiretaps there is nothing whatever in the record now before us to show that the appellant or his counsel, in defending against the criminal charge of tax evasion, before or at the trial made any effort to discover whether evidence which the prosecution proposed to offer and did offer at the trial had been obtained through the use of wiretaps or to exclude evidence obtained therefrom. Such inaction, in our opinion, constituted a lack of diligence which warranted denial of the motion in so far as it sought a new trial on the ground that some of the evidence received at the trial had been obtained by wiretaps. Especially is this so since, as Judge McGohey remarked below: "[t]here is no rational basis for believing he [the appellant] is so naive as to have supposed that the practice which then [in 1943] proved so fruitful for the State investigation was discontinued." In any event, Judge McGohey after painstaking hearing and meticulous consideration of the appellant's motion found a lack of diligence. There was certainly ample evidence to

support that finding. And as the Supreme Court said in *United States* v. *Johnson, supra,* at page 111, " * * * it is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact." The Court further said that an appellate court should never intervene "where it does not clearly appear that the findings are not supported by any evidence." 327 U. S. at page 112.

The appellant argues that until the recent decision in *Benanti* v. *United States*, 355 U. S. 96, the use made by federal agents of the taps by State authorities was generally believed not to be illegal and that consequently his absence of effort to discover and exploit such evidence in advance of trial involved no lack of diligence. Essentially the same argument was made in *Sunal* v. *Large*, 332 U. S. 174: there, as here, the argument was "that since the state of the law made the appeals seem futile, it would be unfair to those registrants [i.e., convicted defendants] to conclude them by their failure to appeal." In *Sunal*, the Court answered this argument by pointing out that "the question of law had not been decided by the Court, * * * . The case, therefore, is not one where the law was changed after the time for appeal had expired. * * * It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized. Of course, if [the defendants] had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile."

The answer is equally applicable to the argument now made for Costello. He too, like the defendant Benanti, might have raised the point now pressed, on trial and by appeal. And because he now, belatedly, seeks to press the point by a motion for a new trial, he is entitled to no more

favorable treatment than the defendants in *Sunal* who unsuccessfully sought to raise their claim by *habeas corpus*. Moreover, before the Supreme Court decision in the *Benanti* case had been announced appellant's present counsel asserted the very claim now under discussion in the petition below for a new trial. Due diligence required that it be raised seasonably by objection or motion for suppression at or before the trial.

Since we conclude that for lack of diligent discovery and seasonable objection the wiretap evidence does not constitute ground for a new trial, it is unnecessary to discuss the vigorously disputed issues as to whether any of the prosecution's evidence was obtained by wiretaps and if so the extent of its impact on the verdict.

MAIL WATCH

Appellant by amendment to his motion contends that in violation of 18 U. S. C. §§ 1701-1703 the Government had placed a watch upon his mail whereby Post Office employees during specified periods recorded the names and return addresses which appeared on the outside of mail addressed to the appellant and transmitted the information thus obtained to the prosecution for use in tracking down evidence of Costello's expenditures which was material to the presentation of a net-worth tax evasion case.

There was no proof offered of the actual delay of any mail and the appellant admitted that he never complained to the Post Office about any delays. The District Judge found, however, the practice was such that "while not inevitable, some delay was probable, but only to a very limited extent, i.e., of such mail as reached the Ansonia Station [New York City] just shortly before the carriers were to start out on their travels. Such mailing, however, would be ready for the following delivery." The Judge further found that there was no delay at all in mail sent to Costello's summer residence. Thus, even assuming some delay in city mail, it is apparent that it was never a delay of more than

one delivery. We do not think this comes within the proscription of § 1701 which declares that anyone who "knowingly and wilfully obstructs or retards the passage of the mail" shall be guilty of a crime.

Nor do we think there has been any violation of § 1702 which, in pertinent part, declared it to be a crime for anyone to take any letter " * * * out of any post office * * * or which has been in any post office * * * before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another * * * ." It is undisputed that the mail here in question was never taken "out of any post office" prior to delivery, or that it was ever opened as above stated. Nothing more was done than to record the information carried on envelopes addressed to the appellant. We think this does not come within the prohibition against "taking" a letter or prying into another's secrets or business as used in the statute. In *Ex Parte Jackson*, 96 U. S. 727, the Supreme Court's discussion shows that a distinction is to be drawn between material which is sealed and material which is open for inspection. We think the *Jackson* case necessarily implies that without offense to Constitution or statute writing appearing on the outside of envelopes may be read and used. There seems to be a similar implication in *Oliver* v. *United States*, 8 Cir., 239 F. 2d 818, petition for certiorari dismissed 353 U. S. 952: certainly that case does not suggest that the law is otherwise.

Section 1703(a) penalizes any "Postal Service employee" who "unlawfully detains, delays, or opens any letter * * * which shall come into his possession * * * ." However, as we have held in interpreting that section, detention alone without proof that it was for an unlawful purpose does not constitute a violation of this section. *Fliashnick* v. *United States*, 2 Cir., 223 Fed. 736.

The appellant relies upon a revision of postal regulations made as a result of the report of a Senate Committee which

was created to investigate charges that a member of the Senate had been subjected to a mail watch. After holding hearings, the committee reported that although the Chief Inspector of the Post Office Department had testified that the mail must not be delayed or withheld, "it is obvious to your committee that some delay in the mail is unavoidable if the request for coverage is complied with." S. Rep. 2510, 83rd Cong., 2nd Sess., printed at 101 Congressional Record 2564. As a result of this report the Postal Laws and Regulations Sec. 41.4 (1948 ed.), which had expressly sanctioned mail watches at the request of "officers of the law," was rescinded except in so far as applicable to "fugitives from justice." We think, however, that neither the Committee Report nor the revision of the regulations bring a mail watch such as this within the ban of the statutes.

At the hearing on the motion below appellant testified on direct examination that during the periods of the mail watch he and his wife together received on an average, 40 letters a week or about seven a day. It seems unlikely that any delay whatever would result because of the time required to record the data which appeared on the covers of so small a volume. And obviously the action of the Postmaster in revising the regulations as a result of the Committee Report does not amount to a congressional determination either that the regulation was invalid or that the statutes involved were violated.

We conclude that the mail watch was not illegal.

Jurors' Tax Returns

Appellant's third point raises a question of first impression. During the course of the hearing below it developed that prior to appellant's trial the chief prosecutor, for his assistance in selecting a jury, requested an Internal Revenue agent to check the income tax returns of veniremen on the jury panel. The panel consisted of 360 names, but the Revenue Agent testified, without contradiction,

that he inspected only 150 returns. From these the agent made, and transmitted to the prosecutor, notes of the taxpayer's occupation, amount and source of income, number of dependents, amount of taxes paid or refunds, and any unusual deductions. The prosecutor in charge testified that the inspection was undertaken in an effort to find out whether any of the prospective jurors had income tax troubles of their own or had other reasons to be unfavorably disposed to the Government: with this information the prosecution was in a position more intelligently to exercise its peremptory challenges.

On the basis of the notes thus derived, together with other information, the prosecutor adopted a numerical system for classifying the jurors, with Class No. 1 composed of those thought probably to be most favorable to the Government, and No. 3 or 4 least favorable. The jury as ultimately constituted contained eight jurors in Class 1 and two each in Class 2 and Class 3. The Government exercised five of its six peremptory challenges: these were exercised against two Class 2 veniremen and against three in Class 3.

The appellant contends that the use by the prosecution of this procedure vitiated his conviction not because it violated any statute or rule of the Supreme Court but because in so doing the prosecution violated the confidential nature of income tax returns and thereby obtained a jury which was "specially conditioned" to find appellant guilty. He contends further that the practice is such that in future cases jurors will be intimidated.

The Government contends that the practice is authorized by Treasury regulations. It relies upon 26 C. F. R. § 458.32 (1949), which declares that employees of the Treasury Department "whose official duties require inspection of returns may inspect any such returns" without making any written application, and also upon 26 C. F. R. § 458.204, which declares that copies of returns "may be furnished to a United States attorney for official

use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for the use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General * * *."

It is undisputed that no written request was made for these returns. However, we agree with the Government that under § 458.204 it is only when the returns are sought by "an attorney of the Department of Justice," as distinguished from a "United States attorney," that a written request is necessary. We also hold that the same regulation which authorizes copies of tax returns to "be furnished to a United States attorney" is broad enough to sanction the informal arrangement whereby at the United States Attorney's request an Internal Revenue agent abstracted and transmitted the requested data. In any event, we hold, the absence of a written request, if one was required by the regulation, would not of itself warrant a new trial. And the broad language of § 458.204 plainly does not limit the inspection to tax litigations or to tax returns of accused or suspected tax evaders. But even if the language should be narrowly construed, we believe appellant may not complain of the inspection of returns of others. See *Goldstein* v. *United States*, 316 U. S. 114.

As to the claim of a "specially conditioned" jury, appellant does not say that the jury which was impaneled was prejudiced against him. He does not claim that any of the jurors were approached by the Government on the subject of their taxes. Nor is there any claim that any of the jurors, until the publicity attendant on the hearing below, knew that their income tax returns had been inspected.[3] The preparatory technique of which the

[3] It was, however, brought out below that the Government has similarly used jurors' tax returns in certain other unspecified cases.

appellant complains did not result in a "blue ribbon jury" or tend to produce such a jury. For the technique was not applied to the selection of the panel: only after the panel had been convened in accordance with the usual procedure was the technique utilized.

The appellant contends that the trial was unfair in that in exercising its challenges the Government had access to information not available to him or to even the wealthiest defendant. But as appellant admits in his brief, not all information properly available to the prosecution is equally available to the accused. In *Best* v. *United States*, 1 Cir., 184 F. 2d 131, cert. denied 340 U. S. 939, and in *Christoffel* v. *United States*, D. C. Cir., 171 F. 2d 1004, reversed on other grounds 338 U. S. 84, the courts upheld district court action which refused to permit the defense to inspect FBI reports on the prospective jury panel. And in other phases of a criminal trial the Government may properly obtain and use information not available to the defendant. Thus under Rule 6(e), Fed. Rules Cr. Proc., the grand jury minutes are available only to the prosecution.

Appellant further claims that the practice is against public policy in that, once it becomes generally known, prospective jurors will be intimidated or will attempt to avoid jury duty. These, we incline to believe, are far-fetched bogies. Prospective jurors whose returns are vulnerable are the very ones whose elimination is facilitated by the practice: knowledge by the others that they were found acceptable to the Government even after an inspection of their returns would hardly be conducive to their intimidation. And the argument that the practice will tend to discourage cheerful jury service, if of any force at all in view of the mandatory nature of such service, would seem not to apply to those having made honest tax returns. There would seem to be no good reason to believe that knowledge that jury service entails exposure of one's tax return to the scrutiny of a district attorney would deter a good citizen from service in the judicial establishment

any more than the fierce publicity which beats upon the private affairs of the citizen appointed to high office in the executive department deters acceptance of such appointment. However that may be, we will not attempt to make a policy-determination as to the propriety of the practice by weighing its aid to law enforcement against its limited curtailment of the privacy of tax returns. For we think this court may not assume to proscribe a practice of the United States attorney's office which violates no statute and no rule which the Supreme Court has made in the exercise of its supervisory power over administration in the lower federal courts. Cf. *McNabb* v. *United States*, 318 U. S. 332.

Quite apart from these policy considerations, the crucial question here is whether this appellant was tried by a fair and impartial jury. Since none of the jurors in this case had knowledge of the practice there is utterly no basis for the contention that it resulted in a jury "specially conditioned" to convict or otherwise biased or prejudiced against the defendant. At most, the practice led to challenges of jurors who might have been unduly biased in favor of the defendant. The exercise of peremptory challenges is a rejective, rather than a selective, process of which the appellant has no right to complain. *United States* v. *Marchant*, 25 U. S. (12 Wheat.) 480; *Hall* v. *United States*, D. C. Cir., 168 F. 2d 161, cert. denied 334 U. S. 853, reh. denied 335 U. S. 839; *United States* v. *Paff*, 2 Cir., 211 F. 2d 171, 185, cert. denied 347 U. S. 963.

Conclusion

A motion for a new trial is always addressed to the discretion of the district judge. *United States* v. *Johnson*, *supra*; *United States* v. *On Lee*, 2 Cir., 201 F. 2d 722, cert. denied 345 U. S. 936. We conclude that the district judge below properly exercised his discretion in denying the appellant a new trial.

Affirmed.

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No. 1047

In the Supreme Court of the United States

OCTOBER TERM, 1957

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 781a–802a) is reported at 157 F. Supp. 461. The opinion of the Court of Appeals (Pet. 2a–14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1958 (Pet. 1a). The petition for a writ of certiorari was filed on June 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because the Government, seeking information to aid it

in the exercise of its peremptory challenges, secured, unbeknownst to members of the jury panel, information obtained from the tax returns of members of that panel.

2. Whether petitioner is entitled to a new trial on the ground that evidence was used against him which had been obtained by illegal wire tapping by state officials where the district court found (a) that the petitioner knew, or in the exercise of due diligence should have known, of the likelihood of such use prior to trial and (b) that there was sufficient evidence to sustain the conviction apart from all evidence claimed to have resulted from the wire tapping.

3. Whether petitioner is entitled to a new trial on the ground that the Government had instituted, and secured leads from, a mail watch pursuant to which post office employees recorded the names and return addresses appearing on the outside of envelopes addressed to petitioner.

STATUTES AND REGULATIONS INVOLVED

Section 55 (a) of the Internal Revenue Code of 1939, Sections 1701, 1702, and 1703 of 18 U. S. C., Sections 463C.32 and 463D.4 of Treasury Regulations 111, Appendix, and Section 41.4 of the Postal Laws and Regulations are set forth in the Appendix, *infra*, pp. 20–22.

STATEMENT

Petitioner seeks review of an order denying his motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure. The motion was filed after his conviction for income tax evasion had been sustained by the Court of Appeals and by this Court.

Petitioner was indicted in the Southern District of New York on March 11, 1953, the indictment charging in four counts that petitioner had willfully attempted to evade income taxes for the years 1946, 1947, 1948, and 1949 by filing false and fraudulent income tax returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939. After an extended trial, petitioner was acquitted on the first count, convicted on the remaining three counts, and sentenced to three concurrent five-year sentences.[1] He was also fined $10,000 on each of these three counts. On appeal, the Court of Appeals affirmed the conviction on the third and fourth counts and reversed as to the second count. 221 F. 2d 668. This Court granted certiorari limited to the sufficiency of the evidence before the grand jury (350 U. S. 819) and affirmed the conviction on counts three and four (350 U. S. 359). (Pet. 3a.)

On May 15, 1956, petitioner filed a motion pursuant to 28 U. S. C., Sec. 2255, and Rule 33 of the Federal Rules of Criminal Procedure to set aside his sentence on the ground that it was illegal. This motion was denied by the District Court, and the Court of Appeals affirmed. 239 F. 2d 177. This Court again granted certiorari (352 U. S. 988) and it affirmed the order denying the motion (353 U. S. 978). (Pet. 3a.)

On November 28, 1956, petitioner filed the present motion for a new trial upon the ground that the Government had secured evidence which led to his convic-

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[1] As a result of several admissions to bail, petitioner, although sentenced in May, 1954, has served only ten months of his sentence to date. (Pet. 3a.)

tion through information obtained by wire tapping. A hearing on this motion was deferred pending this Court's decision on the issue raised by petitioner's motion to set aside his sentence. Following this Court's decision on that issue, the present motion was heard by the District Court on June 13 and 14, 1957, and from October 7, 1957, to October 22, 1957, the hearing consuming eleven court days. (R. 11a–13a, 14a–17a.) During the course of the hearing, petitioner was permitted to amend his motion to include two additional grounds for setting aside his conviction: (1) that evidence had been obtained as a result of unlawful interference with petitioner's mail; and (2) that the Government had examined the federal income tax returns of members of the jury panel prior to trial and had thus deprived petitioner of an impartial jury. (R. 23a–26a.)

At the hearing, it was shown that the District Attorney of New York County, a state official, had installed wire taps on petitioner's telephone from May 7, 1943, to November 5, 1943; from June 11, 1946, to September 10, 1946; and from September 20, 1950, to April 15, 1952. All of these taps were installed pursuant to court orders issued under Section 813–a of the New York Code of Criminal Procedure. All records of such taps and all transcriptions of intercepted conversations were produced by the District Attorney and examined by petitioner's counsel. They were marked for identification and some 242 transcriptions were received in evidence. (R. 788a.)[2]

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[2] In support of his motion in the District Court, petitioner claimed that evidence obtained by wire tapping by federal offi-

Testimony at the hearing also disclosed that, at the Government's request, a mail watch was instituted in July, 1950, with respect to mail addressed to petitioner and his wife at their homes. This watch was maintained for periods of two weeks, every two or three months, until the case was referred to the United States Attorney early in 1953. The two weeks involved in each period were the last week of one month and the first week of the succeeding month, the period in which bills are customarily received. During the periods covered by this mail watch, post office employees recorded names and return addresses appearing on the outside of envelopes addressed to petitioner and his wife. The mail was then immediately returned to the appropriate route bag or box for delivery to the addressee. (Pet. 8a; R. 793a–794a.)

During the course of the hearing on the present motion, it appeared that, prior to petitioner's trial, the prosecutor had requested an Internal Revenue agent to inspect the 1952 income tax returns of the 360 persons whose names were drawn for the panel of jurors for the April 1954 term of court. The agent inspected 150 tax returns and recorded in each instance the taxpayer's occupation, the amount and source of his income, the number of his dependents, the amount of taxes paid or refunded and any unusual deductions. On the basis of the information received, together with other information, the prosecutor classi-

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cials was also used and that the state wire tapping not only resulted in illegal evidence but also interfered with his right to counsel. The court found against him on the facts as to both of these issues and petitioner raises no issue as to either of them in this Court.

fied the jurors by a numerical system, with Class 1 representing those thought to be most favorable to the Government and Class 3 or 4 those least favorable. As ultimately constituted, the jury was composed of eight jurors in Class 1 and two each in Class 2 and Class 3. The Government exercised five of the six peremptory challenges permitted it; these were exercised against two members of the panel in Class 2 and three in Class 3. (Pet. 10a–11a; R. 798a–801a).

At the conclusion of petitioner's evidence, the Government moved to dismiss his motion on the ground that he had failed to make a *prima facie* case. After consideration of the matter, the District Court filed an opinion denying petitioner's motion for a new trial in all respects.

The District Court found that petitioner had failed to show that the availability of state wire tap evidence to federal agents was not known to him, or could not have been discovered by him, prior to the original trial. The court pointed out that petitioner knew that his telephone was tapped in 1943 and suspected it thereafter. The court further found that if all the evidence allegedly obtained from wire taps had been excluded from the trial, there nevertheless would have been sufficient evidence to sustain the conviction on counts three and four of the indictment.[3] (R. 781a–790a.)

With respect to the mail watch, the District Court found that it was authorized by postal regulations, that it was not in violation of any statute, and that

[3] As previously noted, the jury acquitted the petitioner on Count 1 and his conviction on Count 2 was reversed by the Court of Appeals. (Pet. 3a.)

the recording of information made public by the senders on the outside of envelopes did not violate any of petitioner's rights. It also found that the total of the expenditures claimed to be related to the mail watch was too small to be significant, and that if evidence as to such expenditures had been excluded there would have remained sufficient evidence to sustain the conviction. (R. 793a–798a, 802a.)

As to the examination of income tax returns of members of the jury panel, the District Court found that such examination was authorized by appropriate Regulations, that no juror was subject to surveillance by government agents either before or during the trial, that none was told that his return had been inspected, and that none was interviewed by any government representative before or during the trial. In the District Court's view, the prosecution was not required to disclose to petitioner the information upon which it relied in challenging prospective jurors. (R. 798a–801a.)

The Court of Appeals, in affirming the order of the District Court, likewise considered the separate claims made by petitioner in his motion for a new trial. With respect to evidence allegedly obtained from wire tap information, the Court of Appeals found it necessary to consider only the District Court's finding that petitioner had failed to show that the alleged use of such information was not known, or could not with due diligence have been discovered, prior to petitioner's trial. It pointed out that petitioner had known that his telephone

was tapped in 1943 but had made no effort to discover, either before or at the trial, whether any of the prosecution's evidence had been obtained through the use of wire taps. Such inaction, the Court of Appeals concluded, constituted a lack of diligence warranting rejection of this ground of petitioner's motion. (Pet. 4a–8a.)

As to the contention based upon the mail watch, the Court of Appeals held that there was no basis for finding that there had been any significant delay in delivery of petitioner's mail; that what was done was authorized by appropriate Regulations; and that there had been no violation of any provision of law. (Pet. 8a–10a.)

Petitioner's claim that he was prejudiced by the Government's inspection of the income tax returns of some of the members of the jury panel was likewise rejected. The court held that inspection of such returns was authorized by existing Regulations, and that petitioner was not entitled to all information available to the prosecution. The crucial question, as the Court of Appeals saw it, was whether petitioner was tried by an impartial jury. The court concluded that the Government's use of its information for purposes of exercising its peremptory challenges did not tend to show that the jurors chosen were not impartial.

ARGUMENT

Notwithstanding petitioner's assertion that this case involves serious questions as to the integrity of the jury system and the use of evidence obtained illegally through wire taps or a mail watch, exami-

nation shows that petitioner's rights have not been violated. In view of the prolonged history of this litigation, petitioner has a heavy burden to establish that it was an abuse of discretion to deny his belated motion for a new trial. This burden, we submit, has not been sustained.

1. Petitioner challenges the inspection of the federal income tax returns of some of the members of the jury panel and the delivery of the information obtained therefrom to the United States Attorney for his use in making peremptory challenges. His principal argument is that inspection of the income tax returns was not authorized by law. Section 55 (a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 20) provides, however, that income tax returns constitute public records open to inspection under Regulations prescribed by the Secretary of the Treasury and approved by the President. Such Regulations have been prescribed and approved in the manner provided by law and expressly authorize the inspection here made. Section 463C.32 of Treasury Regulations 111 (Appendix, *infra*, p. 21) authorizes the inspection of returns by employees of the Treasury Department in the performance of their official duties. Section 463D.4 of the same Regulations (Appendix, *infra*, p. 21) also authorizes the furnishing of such returns to a United States Attorney for use in litigation or in preparation for litigation in which the United States is interested. The recipient of the information in the present case was the United States Attorney, and Section 463D.4 imposes no requirement that a United States

Attorney must make written application for such information, as petitioner contends.[4] Petitioner's assertion that the information furnished to the United States Attorney was made in violation of law is thus groundless.[5]

It is true, as petitioner appears to argue, that the Government had available to it information which was not available to him. But this information was useful only for the purpose of making peremptory challenges, which, of course, can be made for any reason, rational or irrational. Moreover, in criminal prosecutions, not all information available to the prosecutor is likewise available to the defendant. *Best* v. *United States,* 184 F. 2d 131 (C. A. 1st), certiorari denied, 340 U. S. 939; *Christoffel* v. *United States,* 171 F. 2d 1004 (C. A. D. C.), reversed on other grounds, 338 U. S. 84; Rule 6 (e), Federal Rules of Criminal Procedure. Specifically, a defendant is not entitled to inspection of notes made by the prosecution for its use in selecting a jury. *Christoffel* v. *United States, supra.*

The integrity of the jury system was in no way endangered by the inspection of tax returns of some members of the jury panel. None of the prospective jurors was under surveillance, was aware that his

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[4] Section 463D.4 does impose a requirement of a written application for the furnishing of returns "to an attorney of the Department of Justice." This provision, however, follows the first part of the regulation in which the furnishing of returns to a United States Attorney is authorized without limitation.

[5] As the court below also noted, petitioner may not complain of the inspection of income tax returns of other persons. *Goldstein* v. *United States,* 316 U. S. 114.

tax returns were being inspected, or was approached by any Government representative before or during the trial. What was done here amounted to nothing more than an inspection and compilation of information lawfully in the possession of the Government in order to determine whether any prospective jurors had had tax difficulties of their own and thus might be unduly biased in favor of petitioner. Compare *Best* v. *United States, supra; Christoffel* v. *United States, supra.* A defendant in a criminal case is entitled to an impartial jury, not to have particular jurors serve on a jury. *United States* v. *Puff*, 211 F. 2d 171 (C. A. 2d), certiorari denied, 347 U. S. 963. He may not complain of the Government's exercise of its peremptory challenges if the jury finally selected is in fact impartial. *United States* v. *Marchant*, 12 Wheat. 480; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642; *Hall* v. *United States*, 168 F. 2d 161 (C. A. D. C.), certiorari denied, 334 U. S. 853; *People* v. *Roxborough*, 307 Mich. 575, certiorari denied, 323 U. S. 749.[6]

Assuming, without conceding, that jurors who know that their tax returns have been specially examined might be affected in the performance of their duties, we fail to see that petitioner has standing to complain here. The jurors who sat in his case did not know,

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[6] The present case does not involve any exclusion of a class of persons from the jury panel as in *Ballard* v. *United States*, 329 U. S. 187, or in *Eubanks* v. *Louisiana*, decided May 26, 1958 (No. 550, this Term). The members of the jury panel here were admittedly selected without discrimination, and the Government exercised five of its six peremptory challenges to eliminate unacceptable jurors.

and had no way of knowing, that the prosecution had procured inspection of their returns and hence they could not have been affected.

It is recognized, however, that knowledge of the existence of a practice of special inspection of the tax returns of potential jurors raises the possibility that some persons might wish to avoid jury service in the thought that they might thereby avoid some inconvenience or prejudice as taxpayers. To avoid any possible problems in this respect in future cases, United States Attorneys are being instructed not to engage in this practice. Thus, in so far as the action involved in the instant case might be deemed potentially productive of problems in other cases, those problems are being obviated. We reemphasize that there is no problem here because the instant jury could not have been influenced by what it did not know.

2. Petitioner's motion for a new trial also asserted that the Government had made use of information obtained from telephone conversations which had been intercepted by means of wire taps installed by state officials. The District Court found that petitioner had failed to show that the alleged use of wire tap information obtained from state officials was not known, or could not with due diligence have been discovered, prior to the trial, and that, in any event, there was sufficient evidence not claimed to have been obtained from wire taps to sustain the conviction on the counts of the indictment remaining before the court. The Court of Appeals deemed it necessary to consider only the first of these findings, namely, peti-

tioner's lack of due diligence, and agreed with the District Court that such diligence had not been shown.

Petitioner's main argument on this phase of his motion now appears to be that the courts below were in error in requiring a showing by him that due diligence was exercised in discovering the alleged new evidence. (Pet. 14–16.) He argues that the courts should follow the rules set forth in *Larrison* v. *United States*, 24 F. 2d 82 (C. A. 7th), relating to false testimony, rather than those set forth in *Berry* v. *State of Georgia*, 10 Ga. 511, on newly discovered evidence bearing on the guilt of the defendant. This question, however, is no longer open to controversy. The court below found the answer to this argument not in the language of either of the cases cited, but in the decision of this Court in *Nardone* v. *United States*, 308 U. S. 338. There, the rule was stated that when a claim is made that any part of the Government's evidence is tainted with illegality, the defendant must satisfy the court that he could not at an earlier stage have discovered such illegality. 308 U. S. 338, 342.[7] Actually, this same concept is fairly comprehended in the third condition, quoted by the court below (Pet. 5a) from the *Larrison* case itself:

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[7] In fact, in the original motion for a new trial, as well as in his amended and further amended motions, petitioner made appropriate allegations that the newly discovered evidence was not known to him at the time of trial and could not, with due diligence, have been discovered sooner. (R. 16a, 23a, 25a.) Again, at the hearing before the District Court, petitioner's counsel admitted that he had the burden of establishing that the newly discovered evidence could not have been discovered earlier in the exercise of due diligence. (R. 36a.)

> (c) that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

The proof adduced at the hearing in the District Court clearly demonstrates petitioner's lack of due diligence. He admitted that he knew in 1943 that his telephone was tapped and that these wire taps were again called to his attention in 1951. (R. 657a–658a.) At the time of his trial in this case, he knew that there had been previous wire taps on his telephone. (R. 657a.) In addition, counsel who represented him in the trial of this case testified in the hearing below that they had known as early as 1951 that petitioner's telephone had been tapped. (R. 654a, 701a.) Notwithstanding these facts, petitioner made no effort to ascertain, either before or during his trial in 1954, whether transcriptions of his intercepted telephone conversations had been made available to and used by federal agents. Since he had known of the wire tapping for many years, he had the right to establish this at the trial and to show, by calling or cross-examining government agents, whether the Government had made use of such interceptions. *Nardone v. United States, supra.* This he completely failed to do. Instead, he waited two years, and only after his conviction had been affirmed and his motion to set aside his sentence had been denied by the District Court did he file the present motion. He now asserts that it was not until shortly before the motion was filed that he learned that the results of the wire taps

had been communicated to federal agents.[8] The test, however, is not only what he knew, but what he could have discovered by the exercise of due diligence. As this Court noted in *Nardone* (308 U. S. at 341–342), "timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony." Timely steps could have been taken before petitioner's trial, and it was incumbent upon petitioner to make a reasonable effort to discover whether the Government had obtained evidence through the use of illegal wire taps. His failure to do so, as the Court of Appeals correctly held, constituted a lack of due diligence sufficient to warrant denial of his motion.

Petitioner also attempts to excuse his inaction by asserting that until this Court's decision in *Benanti* v. *United States*, 355 U. S. 96, the use by federal agents of wire taps made by state officials was generally believed not to be open to attack. His actions, however, do not support his attempted justification, for he filed the present motion after the decision of the Court of Appeals for the Second Circuit in *Benanti* and before the reversal of that decision by this Court. In any event, petitioner's attempted justifi-

[8] Petitioner argues that the evidence came to his attention in connection with a denaturalization proceeding (Pet. 6–7). The footnote which follows (Pet. 7) should not be taken as meaning that this Court sustained the dismissal of that proceeding on the ground that the Government was relying on illegal evidence. The decision of this Court, *Costello* v. *United States*, 356 U. S. 256, makes it clear that the basis of the Court's action was failure to comply with the statutory requirements for an affidavit of good cause.

cation is without legal merit. A party's belief that the state of the law, on a question which had not been decided by this Court, is adverse to him does not excuse the failure to assert his rights at the proper time. *Sunal* v. *Large*, 332 U. S. 174.

The finding of the District Court that there was sufficient evidence not claimed to have resulted from wire taps to sustain the conviction is also clearly correct. Petitioner's conviction was obtained by evidence establishing his net worth in the beginning of each of the years involved and his expenditures in those years. In order to do this, the prosecution had to begin with petitioner's sworn statement of October 18, 1937, that his net worth on that date was $40,000. Expenditures proved from October 18, 1937, through the year 1949 totaled some $622,000. As the District Court noted, the total of expenditures the evidence of which could possibly be claimed by petitioner to have resulted from wire taps was at most $87,290.[9] Without undertaking any extensive analysis of petitioner's expenditures during the years in question,[10] it is apparent that the District Court was correct in concluding that there was sufficient evidence not possibly connected with wire taps to support

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[9] Even this sum is in excess of the amount which petitioner might properly claim resulted from illegal wire taps. As the District Court noted, many of the recipients of payments included in this total were never mentioned in any telephone conversation in which petitioner participated. He has no standing to complain of interceptions of conversations to which he was not a party. *Goldstein* v. *United States*, *supra*.

[10] See *United States* v. *Costello*, 221 F. 2d 668, 671–673 (C. A. 2).

petitioner's conviction on counts 3 and 4 of the indictment.

The correctness of the District Court's findings of lack of due diligence and of the sufficiency of the evidence does not present a question warranting review. As this Court has noted, *United States* v. *Johnson*, 327 U. S. 106, 111, findings of fact made by the District Court on a motion for a new trial, unless wholly unsupported by evidence, are not properly reviewable either by this Court or by the Court of Appeals.

3. Petitioner also complains that the Government obtained information by recording the names and addresses appearing on the outside of mail addressed to him. This practice, he asserts, was in violation of law. The imposition of a mail watch for law enforcement purposes was expressly authorized, however, by Section 41.4 (b) of the Postal Laws and Regulations, 39 Code of Federal Regulations (Appendix, *infra*, p. 22). And, contrary to petitioner's claim, the mail watch was not in violation of Sections 1701, 1702, and 1703 of the Criminal Code (Appendix, *infra*, pp. 20–21).

Section 1702 prohibits the taking of mail "out of any post office" with design "to pry into the business or secrets of another." Clearly, there has been no violation of this statute. The District Court found that postal employees merely recorded the names and return addresses appearing on the outside of envelopes and then restored the letters in question to their regular bag or box for normal delivery. No mail was taken out of any post office. Nor was there any

design to pry into the business or secrets of petitioner. Since the information appeared on the outside of the envelopes, it had been made public.[11] This Court has previously drawn a distinction between material which is sealed and that which is open for inspection. *Ex parte Jackson,* 96 U. S. 727. See, also, *Oliver* v. *United States,* 239 F. 2d 818 (C. A. 8th).

Likewise, there was no violation of Section 1703, which penalizes any postal employee who unlawfully detains or delays a letter which has come into his possession. To begin with, here there was no significant delay. Moreover, it is well settled that under this section mere detention or delay alone is not sufficient; the detention or delay must be for an unlawful purpose. *United States* v. *Kirby,* 7 Wall. 482; *Fliashnick* v. *United States,* 223 Fed. 736 (C. A. 2d). That element is also lacking.

Nor can it be seriously contended that the recording of information appearing on the outside of an envelope—a task consuming a few moments—constitutes a willful obstruction or retardation of passage of mail within the meaning of Section 1701. See *United States* v. *Coplon,* 88 F. Supp. 921, 931 (S. D. N. Y.). This action was not taken by intruders, but by postal employees acting under Postal Regulations.[12]

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[11] In fact, petitioner and his wife resided at a large apartment house in New York City and, under the Postal Regulations, mail addressed to tenants in that house was delivered in bulk and was sorted and distributed by employees of the apartment house. (R. 795a–796a.)

[12] Moreover, as the District Court correctly found, the total expenditures as to which evidence could be claimed to have resulted from the mail watch was too small to have any signifi-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CHARLES K. RICE,
Assistant Attorney General.

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JUNE 1958.

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cance. These expenditures totalled $104 for the period prior to 1946 and $16,800 for the period after 1946. (R. 798a, 802a.) In the face of proven expenditures of $622,000 (R. 789a), the insignificance of these expenditures is immediately apparent.

APPENDIX

Internal Revenue Code of 1939:

SEC. 55. PUBLICITY OF RETURNS.

(a) *Public Record and Inspection.*—

(1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

* * * * *

(26 U. S. C. 1952 ed., Sec. 55)

Title 18 U. S. C.:

SEC. 1701. Obstruction of mails generally.

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100 or imprisoned not more than six months, or both.

SEC. 1702. Obstruction of correspondence.

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

*

SEC. 1703. Delay or destruction of mail or papers.

(a) Whoever, being a postmaster or Postal Service employee, unlawfully detains, delays, or opens any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier or other employee of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or secretes, or destroys any such letter, postal card, package, bag, or mail, shall be fined not more than $500 or imprisoned not more than five years, or both.

* * * * *

Treasury Regulations 111, Appendix:

PAR. 110.

* * * * *

SEC. 463C.32 [As added by T. D. 4929, 1939–2 Cum. Bull. 91]. *Treasury Department officials and employees.* The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making such written application. * * *

* * * * *

SEC. 463D.4 [As added by T. D. 4945, 1939–2 Cum. Bull. 97]. *Use of returns in litigation.* The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant

to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.

Postal Laws and Regulations (1948 ed.), Title 5, 39 Code of Federal Regulations (1949 ed.):

SEC. 41.4. *Giving information about mail matter.*— * * *

(b) *Exception for official request.* Upon official request of a representative of another executive department, agency, or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery. When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the First Assistant Postmaster General for instructions, except that in cases involving registered, insured, or collect-on-delivery mail he should submit the question to the Third Assistant Postmaster General, Division of Registered Mail.

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SUPREME COURT, U. S.

No. 1047

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

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IN THE

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OCTOBER TERM, 1957

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FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

This petition for rehearing is based upon an extraordinary statement contained in the Solicitor's brief in opposition to certiorari, which petitioner had no opportunity to answer.

At page 12 of his brief, the Solicitor stated:

> "It is recognized, however, that knowledge of the existence of a practice of special inspection of the tax returns of potential jurors raises the possibility that some persons might wish to avoid jury service in the thought that they might thereby avoid some inconvenience or prejudice as taxpayers. To avoid any possible problems in this respect in future cases, *United States Attorneys are being instructed not to engage in this practice*. Thus, in so far as the action involved in the instant case might be deemed potentially productive of problems in other

cases, those problems are being obviated." (Emphasis added.)

Although the brief in opposition was not due until July 5, 1958, it was filed on June 25 and petitioner's counsel received copies thereof on June 26. Certiorari was denied on June 30. Petitioner had no prior knowledge that inspection of prospective jurors' tax returns was being outlawed in future cases. Consequently, he had no opportunity to file a reply brief dealing with this important matter.

The Solicitor has virtually conceded that the inspection of prospective jurors' tax returns by the prosecution is inconsistent with the proper administration of criminal justice. This concession is completely contrary to the opinion of the court below, which dismissed as "far-fetched bogies" the suggestion that such inspection would discourage jury service and intimidate jurors in the exercise of their functions. It is likewise contrary to the position of the United States Attorney, who stated in the court below that the government "would be remiss in its duty" if it did not inspect the jurors' returns.[1]

Of course, the present Solicitor cannot commit any future Attorney General or Solicitor General to disregard the plain holding of the court below that this practice is entirely legal. If the next Attorney Gen-

[1] At page 51 of his brief in the Court of Appeals, the United States Attorney stated:

> "The Government sought information from all available sources, one of which was the tax returns of some of the prospective jurors. There can be nothing improper in the inspection of the tax returns for this purpose. Indeed, the Government would be remiss in its duty if it did not consider all legally available information."

eral agrees with the United States Attorney who prosecuted this case that it is the prosecution's "duty" to inspect prospective jurors' returns, the practice will undoubtedly be resumed. The decision of the court below will stand as a bulwark against attacks upon its legality and constitutionality.

Moreover, the Solicitor's promise to protect the rights of future defendants does not protect the rights of this defendant. The Solicitor seeks to avoid this obvious principle by suggesting that inspection of prospective jurors' returns does not violate a defendant's rights unless the jurors are aware of the inspection and hence influenced by it.

The coercive effect of such awareness, however, is but one of the reasons why inspection is unlawful. A defendant is entitled to something more than an impartial jury. Certainly a jury may be completely impartial although negroes, women, or daily wage earners have been excluded from the panel, but a defendant convicted by such a jury is admittedly entitled to a new trial. The same result must obtain if jurors are excused contrary to law. If, for example, the trial judge excused for cause all members of the defendant's racial group, or if he doubled the number of peremptory challenges allowed to the government without the defendant's consent, no resultant conviction could stand. If the government uses illegally obtained information in classifying members of the jury panel and exercises its peremptory challenges on the basis of such classification, like considerations should invalidate a resultant conviction.[2] It can make little difference to the de-

[2] By administrative regulations having the force of law, inspection of income tax returns without a duly signed written request is forbidden. Treasury Regulations 111, Secs. 4630.34, 4631.4,

fendant whether the government violates the law in selecting the jury panel or in selecting the actual jurors.

This is thus a serious conflict between the Solicitor and the Court of Appeals for the Second Circuit as to what the law is on this subject and as to how the government should conduct itself in this important phase of criminal trials. This conflict, it appears to us, points out the importance of the first question raised in the petition for certiorari.

We respectfully pray that the Court rehear the application for a writ of certiorari limited to the first question, namely, whether the prosecution may classify prospective jurors on the basis of information derived from their federal income tax returns and use such classification as a basis for exercising its peremptory challenges.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
Counsel for Petitioner.

July, 1958.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is confined to intervening circumstances of substantial and controlling effect.

EDWARD BENNETT WILLIAMS

463D.5. Admittedly there was no proper written request in this case. There is hence no necessity to determine whether Congress could constitutionally permit the prosecution to inspect the returns of prospective jurors.